Supreme Court, U. S.
FILED
OCT 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

(Six Volumes)

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VOLUME III

Pages 173 - 280

JAMES STEWART CO., M. SETH HORNE AND MAURINE D. HORNE V. FRANCIS M. COCKE AND JOAN H. COCKE

COMPLAINT FOR SPECIFIC PERFORMANCE OF REAL ESTATE CONTRACT

Filed: April 22, 1969

COMES NOW the Plaintiffs and for their cause of action against Defendants allege as follows:

I

Heretofore and on the 9th day of October, 1968, JAMES STEWART COMPANY, or its nominee, as buyer, entered into a real estate contract and escrow instructions, Escrow No. 02013111 to Transamerica Title Insurance Company, to purchase from the Defendants, FRANCIS M. COCKE and JOAN H. COCKE, as sellers, approximately 124 acres of land, being that part of the Southeast Quarter of Section 20, Township 1 North, Range 4 East, G&SRB&M, lying North of the right-of-way of the Jenkins Ditch, except a parcel containing from three to five acres containing certain improvements of the seller FRANCIS M. COCKE, situated in the Northeast corner of the property, north of the George Ditch. Brown Engineering Company, Civil Engineers, at the request of FRANCIS M. COCKE, have provided Plaintiffs with a legal description of said real property (adding thereto as agreed upon by the parties, that portion of the right-of-way of the Jenkins Ditch to the water's edge), a copy of which is attached hereto, marked Exhibit "A", and by reference made a part hereof. The Defendant FRANCIS M. COCKE and the Defendant JOAN H. COCKE were and are the

owners of Parcel No. 1 of said real property, as described in the said Brown Engineering description, and the Defendant FRANCIS M. COCKE was and is the owner of Parcel No. 2 of said real property. The Defendants are presently legally able to convey said property in accordance with said Agreement.

II

Under the terms of said Agreement and Escrow Instructions dated the 9th day of October, 1968; a copy of which Agreement is attached hereto, marked Exhibit "B", and by reference made a part hereof, Plaintiff or its nominee agreed to buy and pay for said real estate, as provided in said Agreement, and Defendants agreed to sell and convey the real property described in Exhibit "A", under the time sales provisions of said Agreement to be secured by a mortgage on said property. In compliance with instructions of Defendants, Plaintiffs executed notes and mortgages and deposited the same with Transamerica Title Insurance Company. Copies of said promissory notes and mortgages are attached hereto and collectively called Exhibit "C", and by reference made a part hereof.

III

That in conformity with said Agreement the Plaintiffs nominated M. SETH HORNE and MAURINE D. HORNE as the purchasers under said Agreement, and the Plaintiffs JAMES STEWART COMPANY, M. SETH HORNE and MAURINE D. HORNE either paid or deposited with Transamerica Title Insurance Company all sums required to be paid under said Agreement to this date.

Included therein was $40,000.00 paid directly to Defendants; $20,000.00 of which was paid outside of escrow and $20,000.00 released from escrow to Defendant FRANCIS M. COCKE. A copy of said nomination is attached hereto, marked Exhibit "D", and by reference made a part hereof.

IV

That Defendant JOAN H. COCKE has executed the Deed required to be executed by her, but the Defendant FRANCIS M. COCKE has refused to execute the Deed required to be executed by him. Copies of said Deeds are attached hereto, marked collectively Exhibit "E", and by reference made a part hereof.

V

As an accommodation to the Defendants, Plaintiffs agreed to accept and pay for more than the land described in the Agreement of Purchase, and in consideration for said Agreement, the Defendants agreed to execute and deliver to Plaintiffs a quit-claim deed to a narrow strip of land which includes the easement area of Jenkins Ditch and a power line easement. A copy of said Quit-Claim Deed is attached hereto, marked Exhibit "F", and by reference made a part hereof.

VI

The Agreement provides that Defendants execute partial releases of mortgage in approximately five-acre tracts, which said parcels are to be released to Plaintiffs in conformity with the Agreement of Purchase. The Defendant JOAN H. COCKE has

executed the releases of her interest in Parcel No. 1, but the Defendant FRANCIS M. COCKE has refused to execute said releases. Copies of said Partial Releases are attached hereto, marked collectively Exhibit "G", and by reference made a part hereof.

VII

That Plaintiffs are ready, willing and able to pay the purchase money for the said property to Defendants, and have performed every covenant, term and condition, required to be performed under the terms of the said Agreement, except the payment of future sums under the said contract, which said sums are not yet due and payable, and which said sums the Plaintiffs are ready, willing and able to pay when due.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

1. That the Defendant FRANCIS M. COCKE be required to execute and deliver to Transamerica Title Insurance Company, and the Defendant JOAN H. COCKE deliver to Transamerica Title Insurance Company, sufficient warranty deeds of said property, to M. SETH HORNE and MAURINE D. HORNE, as required by said Agreement, and that Defendants cause to be issued to M. SETH HORNE and MAURINE D. HORNE the title insurance policy required to be furnished thereunder, all in accordance with said Agreement and Escrow Instructions, and that Escrow No. 02013111 at Transamerica Title Insurance Company be ordered closed in accordance with said Agreement and Escrow Instructions.

2. That the Defendant FRANCIS M.

COCKE execute and deliver to Transamerica Title Insurance Company, and the Defendant JOAN H. COCKE deliver to Transamerica Title Insurance Company those certain Partial Releases of Mortgage agreed to be held by Transamerica Title Insurance Company and released to Plaintiffs upon payment of sums as provided in said Agreement.

3. That in the event the Defendants refuse to execute the Deeds, the Partial Releases of Mortgage, or any other items required by Defendants to be executed and delivered, that the Court establish by order and decree, the rights of Plaintiffs.

4. That the Court enter its order designating a depository to whom M. SETH HORNE and MAURINE D. HORNE shall pay the remaining sums to be paid under this agreement, and order Transamerica Title Insurance Company, upon the payment by Plaintiffs M. SETH HORNE and MAURINE D. HORNE of the sums provided to obtain releases of tracts under said Agreement, to release to Plaintiffs M. SETH HORNE and MAURINE D. HORNE tracts as described in said Agreement of Sale and Purchase.

5. That Defendants be required to execute such other papers required to be executed under the terms of said Agreement, or that the Court establish all such matters by order and decree.

6. For reasonable damages for the failure of Defendants to close said Escrow as agreed and to convey said real property to M. SETH HORNE and MAURINE D. HORNE.

7. For such other and further relief as to the Court seems just and proper.

DATED at Phoenix, Arizona, this 22nd day of April, 1969.

TANNER, JARVIS, OWENS & HOYT

By /s/ Wallace O. Tanner
Wallace O. Tanner
Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation, M. SETH HORNE and MAURINE D. HORNE, his wife, Plaintiffs, v. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	NO. C-222472 DEFENDANT F. M. COCKE'S ANSWER AND COUNTERCLAIM AGAINST PLAINTIFF AND TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA AND CROSS-CLAIM AGAINST DEFENDANT JOAN H. COCKE Filed: June 23, 1969

COMES NOW defendant FRANCIS M. COCKE and for his answer and counterclaim against the plaintiffs and against the additional counterdefendant Transamerica Title Insurance Company of Arizona, and cross complaint against defendant JOAN H. COCKE, admits, denies and alleges as follows:

Defendant, counterclaimant against plaintiffs and Transamerica Title Insurance Company of Arizona, and cross-claimant FRANCIS M. COCKE is sometimes referred to herein as defendant, F. M. Cocke, or Seller; plaintiffs-counterdefendants sometimes as

Buyer or Buyers; counterdefendant TRANS-AMERICA TITLE INSURANCE COMPANY OF ARIZONA as Transamerica or escrow agent; and defendant and cross-defendant JOAN H. COCKE as J. H. Cocke, life tenant or Seller. The cross complaint and the counterclaims against plaintiffs and Transamerica are contained in the answer. Defendant's exhibits are made parts of the answer by this reference.

I

Answering Paragraph I of the complaint, admits that on October 9, 1968, an executory real estate contract was entered into by JAMES STEWART COMPANY by Wallace O. Tanner, Vice-President, as Buyer, and FRANCIS M. COCKE and JOAN H. COCKE, as Seller, for sale and purchase of about 124 acres of land in the SE¼ of Sec. 20, 1N 4E, and alleges that on the same day the same parties, and ARLEIGH R. BURTON, Broker, signed an escrow agreement with Transamerica Title Insurance Company, being Escrow Instructions No. 02013111-7, controlling, as later modified by action of parties and along with instructions received from First National Bank of Arizona, Trustee, the deposit, custody, delivery and redelivery of documents and money, which agreement and instructions are attached to the complaint in Exhibits B and C. Alleges that the instructions provided for possession at close of escrow, that the escrow has not closed so as to provide for possession, and that Buyer has not entered into possession nor use of any of the subject land. Admits that Brown Engineering Company, Civil Engineers, at the request of Francis M. Cocke, provided by letter of Dec. 18, 1968 descriptions of Parcels No. 1 and No. 2 and Parcels No. 1A and 2A, which descriptions

are attached to the complaint in plaintiffs' Exhibit A, and admits that as agreed upon by the parties the land north of the north water edge of Jenkins Ditch was included in the descriptions of the land proposed to be sold and paid for.

Further answering Paragraph I admits that F. M. COCKE was and is the owner of Parcel 2 as described in the Brown Engineering description Exhibit A of the complaint, but denies that JOAN H. COCKE was or is the owner of more than a lifetime beneficial interest in any part of Parcel 1 as so described, and affirmatively alleges that her interest was and is only that of life tenant of, entitling her only to the income from, an undivided one-half interest in such Parcel No. 1 or from proceeds of sale thereof, and further alleges that FRANCIS M. COCKE was and is the owner of an undivided one-half interest in such Parcel 1 and that the other undivided one-half interest was and is subject to an irrevocable trust for the benefit of JOAN H. COCKE, life tenant, and BARBARA COCKE VALDEZ, DOROTHY COCKE and ELIZABETH COCKE, a minor (children of Francis M. Cocke and Joan H. Cocke), remaindermen, as provided by the Property Division Agreement of Jan. 24, 1964 between Francis M. Cocke and Joan H. Cocke, implemented by the Trust Agreement of Aug. 7, 1964 between J. H. Cocke and First National Bank of Arizona as trustee, and modified and affirmed as modified by the Supplemental Agreement of Oct. 18, 1965 between J. H. Cocke and F. M. Cocke. Alleges that all three of these agreements were held to be valid and in full force and effect by judgment of the Maricopa County Superior Court of March 17, 1967, from which no appeal was taken, in Cause No. D-89833, Second and Third Claims

for Relief, by JOAN H. COCKE, plaintiff, versus FRANCIS M. COCKE, FIRST NATIONAL BANK OF ARIZONA, BARBARA COCKE VALDEZ, DOROTHY COCKE, a minor, and ELIZABETH COCKE, a minor. Copies of these three agreements are attached hereto as defendant's Exhibit D-A, D-B, and D-C respectively, and are discussed briefly below in this Paragraph I. Denies that F. M. COCKE and JOAN H. COCKE are, or were, legally able to convey the trust one-half interest in Parcel No. 1 except as an equitable conversion of trust land into other trust property, and denies that the agreements between Sellers and Buyers provided for payment to JOAN H. COCKE, alone, of any of the principal proceeds of sale of the trust property.

Further answering Paragraph I affirmatively alleges that Mr. Burton, the broker, and Mr. Tanner, for the Buyer, were both notified by this defendant of the irrevocable trust status of the trust undivided one-half interest in Parcel No. 1 well before any papers were signed, and that both were well aware by reason of such notice that when Joan H. Cocke signed the agreements on Oct. 9, 1968 she agreed, subject to all the terms and conditions of the instruments, to sell no more than the interest she then had and now has, which was and is only the interest of life tenant entitling her to the income for life from the trust one-half interest in Parcel No. 1 or from proceeds of a sale thereof.

Defendant further alleges that at the office of Transamerica immediately following the signing of the sale and purchase agreement by Mr. Tanner and this defendant, and the signing of the escrow instructions by Mr. Tanner, this defendant and Mr. Burton, it was agreed between them that

the next step was to secure the signature of Joan H. Cocke to such instruments and to secure a deed from First National Bank of Arizona, trustee, of trustee's legal title to such one-half interest in Parcel 1. Alleges that Joan H. Cocke signed the sale and purchase and escrow agreements the evening of Oct. 9, 1968.

Defendant further alleges that: On Oct. 10, 1968, a letter of instructions to the trustee Bank was composed by LORETTA S. WHITNEY, Joan H. Cocke's attorney, and F. M. COCKE, at said attorney's office, to be signed by defendants F. M. COCKE and J. H. COCKE, instructing said trustee to execute a deed direct to JAMES STEWART COMPANY (not to J. H. Cocke) to be placed in the escrow with instructions to the escrow agent that the sale was to be consummated in accordance with further instructions to be furnished escrow agent by J. H. Cocke and F. M. Cocke (not by J. H. Cocke alone) governing the distribution of the proceeds of the sale of the trust property. A copy of such defendants' letter to trustee Bank signed by both defendants, and a copy of the Bank's letter to Transamerica accompanying the deed are included by plaintiff Buyers in their Exhibit C, along with a copy of instructions to the escrow agent drafted and signed and placed in escrow by F. M. Cocke on Jan. 21, 1969, but not signed by Joan H. Cocke who apparently on advice of her attorney has refused to sign any such instructions unless they provided for payment to her, free of trust, of the proceeds of sale of the trust property. These instructions submitted by F. M. Cocke after recital of circumstances provided for a higher than average sale price for Parcel No. 1, a lower than average sale price for an equal acreage of F. M. Cocke's land in

Parcel No. 2, computation of commission on the average price, and that the proceeds of sale of the trust property would be paid to Joan H. Cocke AND Francis M. Cocke. This last provision is in accordance, as to effect, with the condition contained in the Bank's letter accompanying its special trustee deed to Buyer, that disposition of the proceeds of the sale of the trust property would be governed by instructions from both J. H. Cocke and F. M. Cocke (not J. H. Cocke alone), and Buyers' earnest money was paid to both Sellers.

Defendant further alleges that: Also included in plaintiff Buyers' Exhibit C are copies of Buyers' promissory note and mortgage, both prepared by Buyer as representing the deferred balance on the trust property after credit of the down payment to have been paid in Dec. 1968 and the release payment to have been paid in January 1969. In addition, Buyer has placed in escrow a personal check drawn on a Virginia bank dated March 7, 1969, payable to "First National Bank of Arizona -- Account of Joan H. Cocke" in the amount of $32,000.00 as payment of release money for releases from the trust one-half interest in Parcel No. 1 to have been paid in January 1969, as mentioned above. Plaintiffs have not furnished a copy of this check with the complaint, and a copy is therefore attached to this answer as defendant's Exhibit D-E. Such promissory note, mortgage and check are all made out in favor of Joan H. Cocke, alone, contrary to the instruction accompanying the deed of trustee's legal title that the proceeds of sale of the trust one-half interest in Parcel No. 1 were to be governed by instructions from J. H. Cocke and F. M. Cocke, as mentioned above. The effect of these instruments is discussed

further in Paragraph II, (2) below.

Defendant further alleges that: In error, the trustee made out its special warranty deed to JAMES STEWART COMPANY to include a trustee's interest in all of Parcel No. 1 instead of only trustee's interest in the trust undivided one-half share therein. Upon verbal objection by this defendant to the description of all of Parcel No. 1, rather than a one-half interest therein, in the Bank's special warranty deed, both the escrow agent and trustee Bank assured him that since the trustee could not effectively deed out any interest it did not have, the error was harmless. A copy of such special warranty deed was not furnished by plaintiff Buyers in their complaint, and a copy is therefore attached to this answer as Exhibit D-D. This special warranty deed sets forth that it is executed by First National Bank of Arizona "as trustee under the terms and conditions of that instrument entitled Trust Agreement, made and entered into on August 7, 1964, between Joan H. Cocke, as Trustor, and said First National Bank of Arizona". Significantly, the Trust Agreement (Exhibit D-B) recites that Trustor desires to establish a trust in accordance with the intent of the Property Division Agreement of Jan. 24, 1964. The Property Division Agreement (Exhibit D-A) provides in Paragraph 3 thereof for an irrevocable trust for the benefit of J. H. Cocke as life tenant and the three children, above named, as remaindermen. Any questions arising as to the extent to which the Trust Agreement of Aug. 1964, to which F. M. Cocke was not a party, modified the trust provisions of the earlier Property Division Agreement of Jan. 1964, were resolved by the later Supplemental Agreement

of Oct. 1965, between J. H. Cocke and F. M. Cocke (Exhibit D-C) ratifying and affirming the provisions of the Property Division Agreement except as specifically modified by such Supplemental Agreement.

Further answering Paragraph I, defendant alleges that when he and J. H. Cocke exercised the authority granted them by the Trust Agreement to withdraw the trust one-half interest in Parcel 1 from the control of the trustee Bank, they assumed the responsibilities of resulting or constructive trustees, and alleges that he would be liable to the remaindermen for any loss resulting to their interests in the trust corpus by payment, as now proposed by Buyers and J. H. Cocke, of trust principal funds to the life tenant in the amount of about $123,000.00.

Further answering the last sentence of Paragraph I, denies that defendants J. H. COCKE and F. M. COCKE are legally able to convey Parcel 1A and Parcel 2A described in the Brown Engineering Company description attached by plaintiff Buyers to their complaint as Exhibit A, and denies that said Agreement, or the real estate contract mentioned in Lines 16 and 17 of Page 1 of the complaint, or any other agreement provides for the conveyance by defendants of Parcel 1A or Parcel 2A. This point is discussed further in Paragraph II (3) below.

II

Answering those portions of the first sentence of Paragraph II of the complaint not already answered by Paragraph I above, defendant denies that Buyers agreed to buy or to pay for Parcels No. 1A and No. 2A described in the Brown Engineering Co.

description marked plaintiffs' Exhibit A, and denies that defendants agreed to sell and convey Parcels No. 1A and No. 2A, either in any of the various provisions of the Agreement and Escrow Instructions directly affecting only sellers and buyers, and the broker, or in any of the provisions of the Agreement and Escrow Instructions binding also on Transamerica, contracting as escrow agent and title insurer, concerning mainly the mechanics of the transaction including deposit of documents and money and custody, delivery or redelivery thereof, dates for compliance, and cancellation provisions, plus marketability of titles.

Alleges that as surveyed Parcel 1A contains .8720 acres, and Parcel 2A contains .3923 acres, and together they constitute a long, narrow strip of land all along the south side of the land proposed to be sold, which strip is bounded on the north by the north water edge of Jenkins Ditch and on the south by an old fence line and a line of power poles. Alleges that defendants have never claimed title to this strip, which is occupied by the Jenkins Ditch and the power poles, although most of it lies north of the fense continuously maintained by them, beginning about 25 years ago, up until the time the pasturing of cattle in the area was no longer practised. Alleges that at one time defendant offered to quit-claim his possessory interest in the strip to Mr. Horne, for nothing, or to file and wait out a quiet title suit and if successful to sell his interest separately to Buyer at the stated price per acre, but Mr. Horne stated that if he became the owner he would probably have to pay for a pipeline replacing the open Jenkins Ditch, and did not want the strip at any price. Alleges that for this reason this defendant did not

pursue the matter with J. H. Cocke, who would have to join in any deeds and in any quiet title suit, which suit would also require the cooperation of trustee Bank, not always readily forthcoming. In the event that it should prove useful, defendant has attached hereto as Exhibit D-F a copy of the 1892 grant of easement for Jenkins Ditch by defendants' predecessor in interest, which grant specifies a 24 foot right of way some 2 rods south of the present location of the ditch. Alleges this places the north right of way line of Jenkins Ditch no farther north than the north water edge.

Further answering Paragraph II, defendant admits that Buyers executed notes and mortgages with attached descriptions of the property to be mortgaged representing the deferred balances due on the proposed sale and deposited same with Transamerica and attached copies of same to the complaint in Buyers' Exhibit C, but denies that such notes, mortgages and descriptions were all in compliance with the agreements and instructions by the parties and in this connection alleges that:

(1)

The description of Parcel 2 attached to the Parcel 2 mortgage included in Buyers' Exhibit C excludes a small triangle of land, worth about $6.00, which was properly included in the description of Parcel 2 by Brown Engineering attached to the complaint as Buyers' Exhibit A. The inclusion of this de minimis parcel in F. M. Cocke's Parcel 2 warranty deed to Buyer, according to a statement made to this defendant on March 20, 1969, but never before, by Transamerica's escrow officer Mr. Henry Kavanaugh, is what

was relied on as the basis of Transamerica's claim that title to Parcel 2 as so described to include such $6.00 triangle is not insurable or marketable, and also as the basis of the escrow officer's statement to F. M. Cocke on March 21, 1969, that he (F. M. Cocke) has therefore never fully complied with the agreements and instructions, and therefore as the basis of the escrow officer's further statement to F. M. Cocke on March 21, 1969 and again on April 3, 1969, that since he (F. M. Cocke) had never fully complied, his 13-day notice of cancellation of the instructions because of Buyers' noncompliance, filed with such escrow officer on March 5, 1969, was ineffective. On March 21, 1969 the escrow officer refused F. M. Cocke's verbal demand, and on April 3, 1969 refused F. M. Cocke's written demand, for the documents signed by him the return of which is provided for by the escrow instructions. The escrow officer, Mr. Kavanaugh, under close questioning in his office on March 20, 1969 by F. M. Cocke, before a witness, as to any deficiencies in the deed to Parcel 2 (on deposit with the escrow agent since about January 24, 1969), failed to point to any deficiency other than the $6.00 triangle, to which, according to Transamerica's title plant, F. M. Cocke did not have title. However, in Paragraph I of Buyers' complaint, Buyers assert that F. M. Cocke did and does have title to such $6.00 triangle by their allegation that F. M. Cocke was and is the owner of, and presently able to convey, Parcel 2 as described in the Brown Engineering description attached to the complaint and marked Exhibit A, which description includes the $6.00 triangle. Buyers are therefore estopped, in attempting to prove their false allegation in Paragraph IV of the complaint, that defendant F. M. Cocke

has refused to execute the deed required to be executed by him, from claiming that his deed already on deposit was or is deficient because of its inclusion of the $6.00 triangle. Alleges that during the questioning by F. M. Cocke of the escrow officer on March 20, 1969, he stated that F. M. Cocke's deed to his one-half interest in Parcel I was satisfactory.

Defendant further alleges that:

There is another, and more substantive, reason why Buyers' and Transamerica's claim, that the inclusion of the $6.00 triangle in F. M. Cocke's deed to Parcel 2 rendered title to the described land uninsurable and unmarketable, is not available to either of them. All of such triangle lies north of the north water edge of Jenkins Ditch, and Buyers in Paragraph I of their complaint allege that as agreed upon by the parties the north water edge of the Ditch is the south line of the land that was to be sold. It is true that the triangle lies within the right of way staked out by the State of Arizona for a short access road connecting to 52nd Street, but the triangle, with its 14.29 ft. base on the line of the north water edge, extends only 9 ft. farther north to its northwest corner. At the time of Brown Engineering's survey, the State, after three years in court, had made no attempt to take from this defendant, and pay for, the title to any land at this location closer to the water's edge than 24½ ft. The State is now attempting to amend its complaint to include additional land at this location, but so far seeks to take from this defendant only the land north of a line parallel to and 9 ft. north of the north water edge, which leaves the triangle in the clear. The State's

physical occupation of the land included in the roadway, which will proably become a city street, will establish only an easement for road purposes, leaving the underlying fee title undisturbed; if the State or City takes title to the $6.00 triangle, payment therefor could be made to any buyers. Brown Engineering describes Parcels 1 and 2, which include half of 52nd Street and about a third of Priest Road, as subject to rights of way and easements for roads, ditches and public utilities.

Years ago the Starley family owned the land south of the Jenkins Ditch, and over the years such land was divided into small parcels and sold off with mismatched descriptions. When the State acquired portions or all of some of these small parcels for its roadways, it secured a quit-claim deed from Mrs. Ada Starley to assure it of clear title to any possible remnants resulting from the earlier mismatched descriptions, and the area within the roadway and north of Jenkins Ditch was included in her quit-claim. Buyers and Transamerica, as a basis for their claims of refusal to sign, unmarketability, and non-compliance, are apparently insisting that F. M. Cocke was divested of title to the triangle by Mrs. Starley's quit-claim to the State, although they have not seen fit to specify just when or by what instrument the Starleys took such title from F. M. Cocke. If the Starley quit-claim granted to the State all the land it included north of the Jenkins Ditch, it is strange that the State has already gone to the trouble and expense of condemning and paying about $4,000.00 to this defendant on about a one-acre parcel occupied by it east of 52nd Street and north of Jenkins Ditch, since the land

covered by the Starley quit-claim, dated Oct. 4, 1965, included all the land east of 52nd Street sought to be taken by the State by its complaint in condemnation against this defendant filed Dec. 29, 1965.

A third and still more earthy reason why no objection should have been made to the inclusion of the $6.00 triangle is that it will be needed by any buyer as a place to pile brush. The triangle is within the staked out access road but lies east of the paving at the point where the State has restricted the large Jenkins Ditch canal to a 36 inch pipeline. Extra heavy rainfall in this area is usually preceded by high winds, and, as has already happened once, the Ditch will plug itself off with tumbleweeds at the intake to the little pipeline, resulting in the flooding of the land to the north unless the brush is removed as carried to the intake by the inevitable heavy flow of storm-drain water. The Tempe city trash crews are instructed not to trespass on private property to pick up brush. On the other hand, the official Tempe Nuisance Inspector would probably cite any landowner who piles brush in a roadway in the truck-load amounts which will be carried to the intake. Common sense would dictate to almost any Tempe landowner in similar circumstances the enlargement, rather than the removal, of the $6.00 triangle.

A copy of the map prepared by Brown Engineering Co. in connection with its surveys, showing the $6.00 triangle and the land now sought to be condemned by the State, and a copy of Mrs. Ada Starley's quit-claim deed to the State, referred to as Docket 5843, page 155, in Buyers' and Transamerica's description of Parcel 2

without the $6.00 triangle, attached to the mortgage for Parcel 2 and included in plaintiff Buyers' Exhibit C, are attached to this answer as Exhibits D-G and D-H, respectively.

(2)

Referring again to Buyers' allegation in Paragraph II of the complaint that Buyers' notes and mortgages were deposited with the escrow agent in compliance with the agreements and instructions of the parties, this defendant denies such allegation and alleges that the note and mortgage representing the deferred balance due on the trust one-half interest but made out in favor of life tenant J. H. Cocke, are, regardless of any secret agreement between Buyers and life tenant or her attorney, contrary to the letter of Oct. 10, 1968 from J. H. Cocke and F. M. Cocke to trustee Bank, contrary to the instructions accompanying the Bank's special trustee warranty deed, contrary to the schedule of distribution of funds, mortgages, releases and commission prepared by the broker, Mr. Arleigh Burton, who is also an instructor of accounting at A.S.U. (copies of such letter, instructions and schedule are included by Buyers in their own Exhibit C', and also contrary to the provisions of the Property Division Agreement (Exhibit D-A) providing for the irrevocable trust (as more fully discussed above in Paragraph I), and therefore contrary to law, particularly ARS Sections 33-221 - 240, and especially Sec. 33 - 225. Defendant alleges that the preparation and deposit by Buyers with the escrow agent of such note and mortgage representing the deferred balance due on the trust property, but made out in favor of the life tenant of the trust,

Joan H. Cocke, and the preparation and deposit by Buyers with escrow agent of the $32,000.00 check representing the release price for releases from the trust one-half interest in Parcel No. 1, but made payable to the account of the life tenant of the trust, Joan H. Cocke, constituted counter proposals to and repudiations of the real estate contract entered into by the parties, and that by such preparations and deposits of such note, mortgage and check Buyers terminated such real estate contract and abandoned all their rights thereunder, and alleges that the deposits into escrow of such check and of the release check of same amount to F. M. Cocke for releases from his one-half interest in Parcel 1 were made after Mar. 5, 1969.

Defendant alleges that transfer of legal title to the trust one-half interest in Parcel 1 by trustee Bank, with the approval of life tenant Joan H. Cocke, is not sufficient to divest the equitable interest of the remaindermen, and alleges that the remaindermen are legally empowered to follow either the land or the proceeds thereof to recover their losses in the event such proceeds be paid to the life tenant as proposed and attempted by Buyers and Joan H. Cocke, life tenant; and further alleges that the title to the trust one-half interest in Parcel 1 so proposed and attempted to be acquired by Buyers, by such payment of the proceeds to life tenant, is neither marketable nor insurable.

(3)

Referring again to Buyers' allegation in Paragraph II of the complaint that Buyers agreed to buy and pay for, and that defendants agreed to sell and convey,

Parcels 1 and 2 (which defendant admits), and also Parcels 1A and 2A (which defendant denies), as described in Buyers' Exhibit A, to be secured by a mortgage on said property, and referring also to Buyers' further allegation in the same paragraph that Buyers executed notes and mortgages in compliance with instructions of defendants, and deposited same with Transamerica, copies of which are included in Buyers' Exhibit C, and which represented the balances allegedly due on all four of such parcels allegedly to be bought and paid for, and sold and conveyed, and secured by mortgage, defendant alleges that no reference whatsoever is made to Parcels 1A or 2A in the mortgages, or in the property descriptions attached thereto, deposited with the escrow agent, nor has any deferred balance due on Parcels 1A or 2A been evidenced by a separate note and mortgage, nor has any increase been made in the face amount of any of the three notes and mortgages deposited with the escrow agent (shown in Buyers' Exhibit C) representing the deferred balances on Parcels 1 and 2 as determined by Mr. Burton in the schedule of funds and mortgages also shown by Buyers in their Exhibit C.

III

Answering Paragraph III of the complaint, defendant admits that M. Seth Horne and Maurine D. Horne are the nominated purchasers, but denies that any of the Buyers either paid or deposited with the escrow agent all sums of money, or instruments representing same, required to be paid under agreement of the parties to Mar. 18, 1969 or to Mar. 20, 1969. Admits that $20,000.00 was paid on or about Oct. 9, 1968 as earnest money by check of James

Stewart Co. payable direct to Joan H. Cocke and Francis M. Cocke, and admits that $20,000.00 was released on or about Jan. 10, 1969 from escrow to Francis M. Cocke by Transamerica's check, but denies that the second $20,000.00 was "paid" to F. M. Cocke and alleges that:

About Sept. 1, 1968 F. M. Cocke signed a preliminary contract, without date, for sale of about the same land as attempted to be sold here, with Tom Fannin & Associates. The proposed sale was to have been handled as a subdivision trust, but the deal fell through because F. M. Cocke insisted on maintaining, as agreed upon in the writing, his seller's first lien position, and Stewart Title and Trust of Phoenix, on whose blank escrow instruction form the proposed contract had been typed by Fannin, refused to accept the trust unless the seller gave Stewart Title first, second and third lien positions, with seller holding only fourth priority on the proceeds of sale of his own land. Inquiry was made at Transamerica, but it too was interested in handling the deal only if seller would take fourth priority position. Lengthy negotiations toward pushing the deal through were had between F. M. Cocke and Mr. Jarrett Jarvis, attorney for Fannin and also law partner of Mr. Wallace O. Tanner, who therefore is presumed to have had knowledge of Tom Fannin and Associates' activities before, on, and after Oct. 9, 1968 equal to the knowledge of Mr. Jarvis. On Oct. 9, 1968, the same day the agreements here in litigation were being signed, Tom Fannin caused the Stewart Title escrow form, which had never been delivered to nor accepted by Stewart Title, to be recorded by Mr. Jarvis, apparently in an attempt to cloud the title and coerce F. M. Cocke

into paying a real estate commission to Tom Fannin and Associates which had acted as both broker and buyer. Since the blanks on the escrow form were without date, escrow number, name of any escrow officer and the signature of Joan H. Cocke, and the signature of F. M. Cocke was not acknowledged, and the signature of Tom Fannin was acknowledged, and the signature of Tom Fannin was acknowledged as of Oct. 10, 1968, the recorder's office indexed and filed the document under Miscellaneous, not under Agreements. However, Transamerica Title sided with Tom Fannin and Associates, and announced that the cloud on the title had successfully been placed and that it would refuse to insure title for the James Stewart Company deal until the cloud was removed, which is a slow process if done by quiet title suit, which is a fact well known to Mr. Tanner. After numerous confrontations between F. M. Cocke and Tom Fannin and his lawyers, other than Mr. Jarvis, and after several conferences between Mr. Horne and Tom Fannin, it was agreed that Mr. Horne would relinquish his first right of refusal to purchase a separate 11.2-acre parcel of Cocke land, that F. M. Cocke would list for sale his interest in such parcel with Fannin, and Fannin would withdraw its claim, which it did on Jan. 9, 1969. F. M. Cocke then advised Mr. Tanner at the office of the escrow agent on Jan. 9 or 10, 1969, that he had entered into the contract with James Stewart Co. for the purpose of raising cash, and owed mortgage payments, notes and debts for machinery due Jan. 1, 1969 of more than $60,000.00, and would be forced to file a 13-day cancellation notice in order to hurry up the Buyers' preparation of their long-delayed release schedule so that the escrow could close. Mr. Tanner proposed

that F. M. Cocke could draw $20,000.00 from escrow, but would have to sign a note and mortgage for $40,000.00.

F. M. Cocke agreed and Mr. Kavanaugh, escrow officer, acting on the instructions of Mr. Tanner for the Buyer, then gave F. M. Cocke a Transamerica check for $20,000.00, drawn against the $44,000.00 placed in escrow as part of the down payment by James Stewart Co., in exchange for F. M. Cocke's note for $40,000.00 payable to James Stewart Co. and secured by a mortgage on Parcel 2. F. M. Cocke did not ask for copies of the $40,000.00 note and mortgage since he expected them to be held in escrow for the protection of the escrow agent itself, the broker and the trust interests in the event of his death or some emergency, but such note and mortgage were pocketed by Mr. Tanner and carried from the building, over the objection of F. M. Cocke that that would amount to taking back the earnest money. The escrow officer made no objection; Mr. Burton was present.

Defendant further alleges that: Under questioning by F. M. Cocke, Mr. Kavanaugh stated on Mar. 5, 1969, and on Mar. 20 and Mar. 21, 1969 before a witness, that the $40,000.00 note and mortgage had not yet been redeposited in escrow, nor had any substitute funds been deposited to replace the extra $20,000.00. Inasmuch as the note is negotiable, Buyer took back and held until at least Mar. 21, 1969 F. M. Cocke's share of the earnest money, about $15,500, and if the note is held by a holder in due course without notice F. M. Cocke is out about $4500 in addition.

Defendant further alleges that:

On Mar. 5, 1969 he went to the escrow agent's office to inquire about Buyers' late releases, and was informed by Mr. Kavanaugh that the releases had been deposited the day before. At F. M. Cocke's request, Mr. Kavanaugh handed him for his signature a stack of 25 releases, averaging about 5 acres each. F. M. Cocke signed 10 releases for land in Parcel 1, and 15 for land in Parcel 2, without close examination on request for copies since he was relying on the escrow officer. Mr. Kavanaugh acknowledged his signature on the first one and said he would acknowledge the rest when he had more time. When F. M. Cocke finished signing the releases, Mr. Kavanaugh handed him for his signature a warranty deed made out to M. Seth Horne and Maurine D. Horne describing as the property to be conveyed Parcel 2 (without the de minimis triangle), Parcel 2A, and an undivided one-half interest in Parcel No. 1 and in Parcel 1A. F. M. Cocke then asked where that deed came from, and Mr. Kavanaugh replied that it had been submitted by Mr. Horne for his (F. M. Cocke's) signature. F. M. Cocke returned the deed, unsigned, to the escrow officer and asked for two copies of it, which the escrow officer than made and gave to him; a copy of a copy is attached as defendant's Exhibit D-J.

Defendant alleges that the preparation and deposit by Buyers with escrow agent of such warranty deed for the signature of F. M. Cocke constituted a counter proposal by the making of a new demand for extra land (Parcel 2A and the half-interest in Parcel 1A) and a repudiation of the real estate contract entered into by the parties, and that by such preparation and deposit Buyers terminated such real estate contract and abandoned all their rights thereunder.

Defendant further alleges that:

F. M. Cocke then requested a 13-day notice of cancellation of escrow instructions form, which the escrow officer partially filled out and gave him, and which he signed and returned to the escrow officer. As provided in the notice itself and in the fine print portion of the printed escrow instructions, this 13-day notice constituted notice to Buyers that unless Buyer complied with all the terms of the escrow instructions by Mar. 18, 1969, the escrow instructions would thereupon become cancelled. By letter of Mar. 6, 1969, escrow agent notified Buyer as provided by the fine print instructions that Buyer would have to comply with all the terms of the escrow on or before Mar. 19, 1969, otherwise Transamerica would have to comply with the notice and the demands therein made. Copies of F. M. Cocke's cancellation notice and of escrow agent's letter of notification thereof to Buyer are attached hereto as defendant's Exhibit D-K, and an enlarged copy of the fine print portion of the printed escrow instructions is attached as Exhibit D-L.

Defendant alleges (as alleged above at Page 19, line 28½) that on March 20 and again on March 21, 1969, the escrow officer, Mr. Kavanaugh, in his office stated to F. M. Cocke before a witness that the $40,000.00 note and mortgage carried from the escrow office on Jan. 9 or 10, 1969 by Mr. Tanner had not been returned, and that no substitute funds had been deposited, and defendant alleges that the agreements were cancelled at the close of business Mar. 18 or 19, 1969 (if not before) in accordance with the provisions of the printed escrow instructions, by Buyers' failure to rede-

posit the $40,000.00 note and mortgage or deposit substitute funds in cash, certified or cashier's check, or money order, in the amount of $20,000.00, and also by their failure to correct the proposed payment of trust proceeds to life tanant before the close of the 13-day period. Alleges that as provided by the cancellation notice personal checks are not to be accepted under a cancellation notice unless approved by the party seeking cancellation, and alleges that F. M. Cocke did not approve any personal checks.

Defendant further alleges that:

On Mar. 11 or 12, 1969, F. M. Cocke received a letter dated Mar. 10, 1969 from the escrow officer stating that escrow agent had received the various checks and documents mentioned in a letter to him from Buyers, a copy of which letter the escrow officer enclosed. Mr. Kavanaugh also stated in his letter to F. M. Cocke that it appeared to the escrow officer that Buyer had done everything that was required of Buyer to close the escrow. Copies of these letters are attached hereto as Exhibit D-M. Buyers' letter to the escrow agent, dated Mar. 5, 1969, specifies the enclosure of the two release checks for $32,000.00 to First National Bank of Arizona, one to account of Joan H. Cocke and the other to account of Francis M. Cocke, dated Mar. 7, 1969, and is not mentioned in Buyers' complaint as an exhibit or otherwise. Buyers' letter states as a condition to delivery of these two checks that escrow agent shall have "recorded the deeds and mortgages which deed is to include a deed to parcels 1A and 2A to the buyers."

Defendant alleges that the preparation and deposit by Buyers with escrow agent of the warranty deed including Parcel 2A and the half-interest in Parcel 1A for the signature of F. M. Cocke, and the handing by the escrow officer of such deed to F. M. Cocke for his signature, constituted an attempt by Buyers and escrow officer, together, to secure F. M. Cocke's signature to such deed, and in this connection defendant alleges that:

The effect of F. M. Cocke's signing of such warranty deed would have been to further extend the delay in closing the escrow until the successful conclusion of a quiet title suit for a marketable title to Parcel 2A and the undivided one-half interest in Parcel 1A, necessarily to be undertaken by F. M. Cocke in order to fulfill the new obligation which would have been so assumed by him. Inasmuch as the warranty deed was prepared, proffered for F. M. Cocke's signature, at the same time as the releases, the long delay which would have resulted from his signing of the deed would have begun almost simultaneously with the end of the earlier delay resulting from Buyers' failure to deposit the releases. Inasmuch as the $40,000.00 note taken from the escrow office by Mr. Tanner about Jan. 10, 1969 provided for interest to be paid thereon by F. M. Cocke beginning about Feb. 9, 1969, the saving to Buyers, and loss to Sellers, of interest on the balances due, which would not begin to accrue until the escrow closed, amounts to about $85.00 per day or about $31,000.00 per year.

Defendant alleges that the handing by the escrow officer on Mar. 5, 1969 in his office to F. M. Cocke for his signature of

the warranty deed which included Parcel 2A and a half-interest in Parcel 1A constituted a major breach of the escrow agent's fiduciary duty to F. M. Cocke, amounting to gross negligence, by the escrow officer's aiding in Buyers' attempt to secure F. M. Cocke's acceptance, by signing such deed, of Buyers' new demand.

In connection with the imposition, not part of the contracts between the parties, of delay on the landowners in their receipt of proceeds of a sale of the land, both principal and interest, defendant alleges that on April 2, 1969 James Stewart Company recorded in the records of Maricopa County Recorder the Agreement and Transamerica Escrow Instructions signed by the parties on Oct. 9, 1968, in Docket 7546, Page 398 - 405, following the same pattern as followed by Mr. Jarret Jarvis, law partner of Mr. Tanner, on Oct. 9, 1968 in recording the Stewart Title escrow instructions discussed above at Page 18, Lines 8 - 27.

Defendant alleges that by such recording Buyers have imposed on the landowners the burden of further delay by making necessary the removal of the cloud on title so cast, in addition to and beyond the delay risked by Sellers as inherent in the land sales and escrow contracts entered into by them, but which inherent delay was limited by the terms and provisions of such contracts, and defendant alleges that if the motive therefor be measured by the result thereof, such recording constituted an attempt by Buyers to coerce Sellers, or any of them, into foregoing their legal and contractual rights to terminate such contracts in accordance with the terms and provisions thereof and sell the land to another buyer without other and further hindrance.

Defendant alleges that by such recording on April 2, 1969, and the consequent imposition on Sellers, or any of them, of extra delay in the realization of proceeds of a sale of the land title to which was clouded by such recording, which extra delay was not imposed by the contracts between the parties, Buyers repudiated such contracts (if not already otherwise repudiated by them) and terminated same and abandoned all their rights thereunder, and further alleges that by reason of such recording and any consequent cloud on the title to the subject land, Sellers, or any of them, have been damaged in an amount equal to 6% interest on the value of the land title to which has been so rendered unmarketable, less the rental value to Sellers of the land for its present farming use, from the date of such recording until such cloud be removed by judicial action or otherwise.

IV

Defendant alleges that:

Paragraph IV of the complaint alleges:

> "That Defendant Joan H. Cocke has executed the Deed required to be executed by her, but Defendant Francis M. Cocke has refused to execute the Deed required to be executed by him."

and specifies:

> "Copies of said Deeds are attached hereto, marked collectively Exhibit "E", and by reference made a part hereof."

On May 15, 1969, twenty days after service of the complaint on F. M. Cocke, he filed a motion to dismiss for failure to state a claim upon which relief could be granted, or in the alternative, petitioned the Court to require plaintiffs to amend their complaint by furnishing copies to the Court and defendants of the deeds specified by Paragraph IV of the complaint (quoted above) but omitted. On May 16, 1969, Mr. Riggs, attorney for F. M. Cocke, received a letter from Mr. Tanner which stated that the two deeds referred to in the complaint as Exhibit "E" were enclosed, but instead of the deed alleged to be required to be executed by Joan H. Cocke, and alleged to be executed by her, the letter contained simply a copy of trustee Bank's special warranty deed, already attached hereto as defendant's Exhibit D-D. A copy of Mr. Tanner's letter with the enclosures other than deeds is attached hereto as Exhibit D-N, and the deed alleged to be the one this defendant refused to sign is attached hereto as Exhibit D-O.

Defendant alleges:

On June 3, 1969, at a brief hearing in chambers, the complaint was amended by the Court with plaintiff's approval to specify the deed executed by trustee Bank instead of the deed alleged to be required to be executed, and executed, by Joan H. Cocke. The original allegation, as stated, included by inescapable implication allegations (1) that the agreements required a deed to be executed by Joan H. Cocke conveying the 1/2 interest in Parcel 1, (2) that such deed was in existence, (3) that she had executed it and (4) that plaintiff had a copy of it to prove such allegations, that (5) life tenant Joan H. Cocke was

therefore the owner of legal title to such 1/2 interest in Parcel 1, and (6) was legally empowered to convey same, and (7) be properly paid for same, and that (8) therefore the note, mortgage and check aleady made out by plaintiff in favor of Joan H. Cocke and representing the deferred balance due on the trust property were in accordance with the agreements and in lawful and proper payment to her for such 1/2 interest in Parcel 1. The amendment approved by plaintiff admitted the falseness of these 8 allegations. Such payment to life tenant for the trust property was declared by escrow agent to be lawful and proper by Mr. Kavanaugh's letter of Mar. 10, 1969 to this defendant declaring that it appeared to him that Buyers had done everything required of them and such declaration amounted to gross negligence or attempted fraud. Copy of this letter is attached as defendant's Exhibit D-M, discussed herein at Page 22, Line 17 to Page 23, Line 3, and at Page 32, Line 31, et seq.

Defendant further alleges:

That immediately following the June 3, 1969 hearing in chambers a discussion was held in the anteroom between Mr. Tanner, Loretta Whitney, defendant Francis M. Cocke and L. Alton Riggs, at which discussion Mr. Tanner admitted that the deed which said defendant had actually refused to sign was the deed prepared by Mr. Tanner's law office, deposited by Buyers with escrow agent for Francis M. Cocke's signature, and handed by the escrow officer on Mar. 5, 1969 to Francis M. Cocke for his signature. This was the warranty deed which included, in addition to Parcel 2 and a half interest in Parcel 1 as earlier

agreed upon, Parcel 2A and a half interest in Parcel 1A not agreed to be conveyed or even quit-claimed by him to Buyers. This is the deed discussed herein at Page 20, Line 19 to Page 21, Line 8; at Page 23, Line 4½ to Page 24, Line 8; and Page 33, Line 12½. Alleges that the new warranty deed prepared by Buyers and enclosed in Mr. Tanner's letter received by Mr. Riggs on May 16, 1969, and also attached to plaintiffs' Response filed herein about May 28, 1969, was never seen by Francis M. Cocke until May 16, 1969 at Mr. Riggs' office, and alleges that such deed and the allegation that it is the deed which he refused to sign are both false, and that such deed was prepared by Buyers and such allegation made in an attempt to deceive the Court.

Denies that F. M. Cocke has refused to execute the deed required or agreed to be executed by him, and denies that he was or is required or has agreed to execute the deed prepared and enclosed by Mr. Tanner in his letter to Mr. Riggs dated May 15, 1969 as being the deed required to be executed by F. M. Cocke. Admits that he refused to execute the warranty deed which included Parcel 2A and an undivided one-half interest in Parcel 1A prepared by Buyers and deposited with escrow agent and submitted to him (F. M. Cocke) for his signature on Mar. 5, 1969 by the escrow officer, for the reasons set forth above in Paragraph I and II at Page 8, Line 1 to Page 9, Line 20; in Paragraph II (3) at Page 16, Line 10 to Page 17, Line 1; and in Paragraph III at Page 23, Line 4½ to Page 24, Line 8.

Alleges that he executed proper deeds to Parcel 2 and to his undivided one-half

interest in Parcel 1, describing such parcels as described by Brown Engineering's survey report attached to the complaint as plaintiffs' Exhibit A, and alleges that such deeds were delivered into escrow on or about Jan. 24, 1969 by Mr. Burton, the broker. Repeats, as alleged above (at Page 10, Line 11 to Page 11, Line 7, and Page 11, Lines 19 to 23) that the escrow officer stated on Mar. 20, 1969 that such deed to the half interest in Parcel 1 was satisfactory, but that such deed to Parcel 2 was not satisfactory, solely because of the inclusion therein of the $6.00 triangle, also discussed above at length in Paragraph II (1), at Page 10, Line 6 to Page 14, Line 15. Alleges that in Paragraph I of the complaint plaintiffs allege that F. M. Cocke is the owner of Parcel 2 and presently legally able to convey same as such Parcel 2 is described in plaintiffs' Exhibit A of the complaint (Page 1 of complaint, Line 26 to Page 2, Line 5½), and alleges that such description includes the disputed $6.00 triangle, and plaintiffs are estopped to reverse their position.

V

Answering Paragraph V of the complaint, denies that defendants agreed to execute and deliver any deed to Parcels 1A or 2A to Buyers, whether quit claim or warranty, admits that copies of quit claim deeds, prepared by Buyers, describing a narrow strip of land are attached to the complaint, marked Exhibit "F", and by reference made a part thereof, and alleges that the narrow strip of land described in such deeds is Parcels 1A and 2A as described by Brown Engineering Company in the descriptions attached to the complaint in plaintiffs' Exhbiit "A". Admits as allege by plaintiffs that the narrow strip of land includes the easement area of the Jenkins Ditch but denies that it includes more than half of the power line easement. Denies that plaintiffs agreed to accept and pay for more land than the land described in the agreement of purchase; alleges that the agreement provided for the sale and purchase of the land north of the north bank of Jenkins Ditch; that by accepted usage by the engineering profession in this area "to the bank" means "to the water's edge" to include access to the water for both drainage and stock watering purposes; and that Buyers agreed to buy and pay for the land north of the north water edge of Jenkins Ditch for access to the actual stream for the existing storm drain waterways, without which waterways Buyers would have been unable to obtain building permits.

Alleges that the 1892 grant of easement for Jenkins Ditch (Exhibit D-F, mentioned above in Paragraph II hereof at Page 9, Line 21 1/2) specifies an easement some 2 rods or 33 feet south of the present

location of the Ditch, and that plaintiffs themselves have alleged in Paragraph V of the complaint that the easement area of the Jenkins Ditch does not extend north of the north water edge thereof, such easement area being included in the narrow strip, Parcels 1A and 2A, and are estopped to claim otherwise.

Further answering Paragraph V, alleges that the deed included in plaintiffs' Exhibit F and prepared by Buyers for the signature of Joan H. Cocke is sufficient to quit claim to Buyers only the interest of life tenant in the undivided one-half interest in Parcel 1A described in such deed, leaving undisturbed the equitable interests in Parcel 1A of the remaindermen. Alleges that the required 10-year adverse possessory interest of Joan H. Cocke and Francis M. Cocke in Parcel 1A was community property, as was Parcel 1, and that by the Property Division Agreement of Jan. 24, 1964, all her community interest in the farm land was made subject to the irrevocable trust. Alleges that no quit claim possessory interest in Parcel 1A was included in the Bank's special trustee warranty deed of legal title to Parcel 1, discussed above in Paragraph I hereof, at Page 6, Line 20 1/2 to Page 7, Line 21 1/2, and in Paragraph II (2) at Page 15, Line 26, to Page 16 Line 5 1/2.

VI

Answering Paragraph VI admits that Schedule A attached to the Escrow Instructions, in the 4th and 8th paragraphs, provides that Seller shall execute partial releases of mortgage in about 5-acre tracts; alleges Buyers verbally agreed to prepare

the release forms, including the location by particular description of each separate parcel, in accordance with their own particular plan for development of the area to be purchased; alleges that Sellers agreed in Paragraph 1 of the Agreement to cooperate with Buyer in altering the boundaries of any of the executed releases to fit the needs of Buyer; alleges that such release forms were impliedly required by Schedule A to be prepared and deposited by Buyers with escrow agent for signature of Sellers by Dec. 15, 1968, the scheduled date for closing of escrow, but that Buyers delayed such deposit until Mar. 4, 1969, without approval by Sellers of such delay.

Alleges that on Mar. 5, 1969 this defendant executed 25 releases handed to him by the escrow officer as being the release forms, and all of them, prepared and deposited by Buyers for F. M. Cocke's signature, as alleged above in Paragraph III, at Page 20, Lines 9 - 25; and alleges that escrow agent was instructed to hold such executed releases, as provided by Schedule A, and that therefore F. M. Cocke did not obtain copies of the 25 releases he executed and is therefore unable to determine at this time in what respects they differ, if at all, from the 25 release forms attached to the complaint as Exhibit G and claimed by Buyers to be copies of the releases which F. M. Cocke has refused to execute.

VII

Answering the last paragraph of the complaint, Paragraph VII, alleges that Buyers are bound not only by the covenants, terms and conditions, expressed or implied, of the Agreement, but also by those of the

Escrow Instructions, as later modified by action of parties, and Schedule A attached to such Instructions, and also by those of trustee Bank's instruction deposited in escrow along with its special warranty deed of legal title, which Agreement and instructions are included by Buyers in their own Exhibits B and C of the complaint; denies that Buyers performed all the covenants, terms and conditions so required to be performed by them on or before Mar. 18 or Mar. 19, 1969; alleges that Buyers failed to perform or otherwise violated the covenants, terms and conditions, expressed or implied, agreed to by them, in the manner and at the times set forth in this answer and counterclaim and cross-claim; and alleges that the later readiness, willingness and ability, later expressed by Buyers, to later pay the purchase money, or future sums when due, or to later comply with any or all of the other covenants, terms and conditions agreed to is immaterial, because of the agreement for cancellation, and their earlier repudiations as herein alleged.

VIII

Further alleges that life tenant, Buyers and escrow agent all had full notice of J. H. and F. M. Cocke's letter of Oct. 10, 1968 to trustee Bank, and full notice of the instruction to the escrow agent from trustee Bank that the proceeds of sale of the trust property were to be governed by instructions from Joan H. Cocke and F. M. Cocke, (discussed above in Paragraph I, at Page 4, Line 2 to Page 5, Line 9), and alleges that life tenant, Buyers and escrow agent had full notice of the instruction to escrow agent from resulting trustee F. M. Cocke,

(trustee discussed above in Paragraph I, at Page 7, Lines 22 1/2 - 32) that the principal proceeds of sale of the trust property were to be distributed by check made payable to Joan H. Cocke and Francis M. Cocke, which parties were to be the joint mortgagees of the mortgage securing the deferred payment of such proceeds (also discussed above in Paragraph I, at Page 5, Lines 9 - 28 1/2); and alleges that life tenant, Buyers and escrow agent were all bound by such instructions, regardless of any secret agreement between Buyers and life tenant or her attorney, or between Buyers, life tenant or her attorney, and escrow agent, and notwithstanding any judgment or order, now on appeal, without supersedeas bond, of the Superior Court of Maricopa County adversely affecting the interests of the remaindermen in the trust corpus but issued upon proceedings had without notice to and in the absence of such remaindermen, or any of them, or legal representative of any remainderman; and further alleges that therefore the refusal of life tenant to sign any instructions governing the distribution of the trust proceeds (discussed above in Paragraph I, at Page 5, Lines 5 1/2 - 28 1/2), and any refusal by life tenant to sign the releases, unless the trust proceeds be paid to her free of trust, and the payment to life tenant of the principal proceeds of the sale of the trust property proposed and attempted by Buyers and life tenant, by the preparation and deposit with escrow agent of the note, mortgage and release check representing such trust proceeds but made out in favor of or to the account of life tenant (discussed above in Paragraph I, at Page 5, Line 29 1/2 to Page 6, Line 19 1/2 and also in Paragraph

II (2), at Page 14, Line 19 to Page 16, Line 5 1/2), and the acceptance by escrow agent of such note, mortgage and check from Buyers, and escrow agent's subsequent announcement through its escrow officer that it appeared to such officer that Buyer had done everything that was required of Buyer to close the escrow, such announcement being made by such officer by letter of Mar. 10, 1969 (discussed above in Paragraph III, at Page 22, Line 17 to Page 23, Line 3 1/2, and attached hereto in Exhibit D-M), all in violation of such instructions, constituted an attempt by life tenant, Buyers and escrow agent, together, to divest the remaindermen of their vested interests in the trust undivided one-half interest in Parcel 1 or proceeds of sale thereof; and alleges that such attempt constituted a major breach, whether fraudulent or negligent, of escrow agent's fiduciary duty to F. M. Cocke, both for himself and the remaindermen; and alleges that by such breach and by the breach committed by escrow agent's escrow officer on or about Mar. 5, 1969, (discussed above in Paragraph III, at Page 20, Lines 19 - 31 and at Page 23, Line 4 1/2 to Page 24, Line 8) by the officer's acceptance from Buyers of the warranty deed including Parcel 2A and the half interest in Parcel 1A and the handing of such deed by such officer to F. M. Cocke for his signature, whether negligent or fraudulent, escrow agent Transamerica assumed full liability to F. M. Cocke for himself and the remaindermen for all damage suffered by reason of such breaches or either of them. Further alleges that if Transamerica was a party to the recording of any agreement or escrow instructions (discussed above at Page 24, Line 10 to Page 25 Line 18) by delivery of

original documents to Buyers, Transamerica is likewise guilty of a major breach of such fiduciary duty, and liable therefor.

And further alleges that life tenant, Buyers and escrow agent are jointly and severally liable for any loss to the remaindermen's interest in the trust corpus resulting from such violations of such instructions; and further alleges that the releases prepared by Buyers and deposited by Buyers with escrow agent and accepted by escrow agent and submitted by escrow agent to Joan H. Cocke or her attorney for signing by Joan H. Cocke and alleged by Buyers to have been signed by her and copies of which are attached to the complaint as Exhibit G are not sufficient, in view of the proposed payment of trust proceeds to life tenant, to release the various parcels described in such releases from the equitable interests of the remaindermen, and either the land sought to be so released or the proceeds of release payments may be followed to recover any loss resulting to the remaindermen's interests in the trust corpus by reason of any such purported release.

Defendant alleges that as provided by ARS Rule 17(a) of Civil Procedure Francis M. Cocke as a party to the Property Division Agreement of Jan. 24, 1964 may sue in his own name, as named in said Agreement, for the benefit of the remaindermen without joining them in the suits.

IX

Defendant repeats (as alleged and discussed above in Paragraph II (1), at Page 10 Line 6 to Page 11 Line 23, and in

Paragraph IV at Page 27, Lines 10 1/2 - 23 1/2) that on Mar. 20, 1969 Transamerica escrow officer, Mr. Kavanaugh, stated to F. M. Cocke, before a witness, that Transamerica was unwilling to insure title to Parcel 2, as described in F. M. Cocke's deed to James Stewart Company (deposited in escrow about Jan. 24, 1969) because of the inclusion of the $6.00 triangle; and alleges that on Mar. 21, 1969 and again on April 3, 1969, before a witness, such escrow officer made it clear that Transamerica still claimed (without reasonable basis therefor) such title to be unmarketable and uninsurable and again stated that Transamerica was unwilling to issue a title insurance policy thereon. As alleged above at Page 10, Line 27 - 32, on Mar. 21, 1969 the escrow officer refused F. M. Cocke's verbal demand, and on April 3, 1969 refused F. M. Cocke's written demand, for the documents signed by him the return of which is provided for by the escrow instructions. Alleges that Paragraph 24 of the fine print instructions, an enlarged copy of which instructions is attached hereto as Exhibit D-L, provides:

> ". . . or if Transamerica Title Insurance Company is unwilling to issue any title insurance policy provided for herein, Escow Agent is directed to pay the charges payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charges payable by Seller, paying the balance then remaining to Seller, and all documents executed by one party only on deposit with Escrow

> Agent shall be returned to the parties who executed said documents. Mutually executed instruments shall be retained by Escrow Agent."

and defendant alleges that escrow agent's verbal refusal to return to F. M. Cocke on Mar. 21, 1969 the documents earlier executed by him and on that day verbally demanded by him, and its further failure, if any, to retain the mutually executed instruments, were contrary to and in violation of Paragraph 24 of the fine print escrow instructions (prepared by Transamerica itself) directing the return of documents executed by F. M. Cocke and the retention of documents mutually executed by Buyer and Seller. Defendant alleges that escrow agent's written refusal on April 3, 1969 to return to F. M. Cocke upon written demand the documents executed by him was also in violation of Paragraph 24. A copy of such written demand, with escrow agent's refusal typed and signed thereon, is attached hereto as Exhibit D-P.

Defendant further alleges that the cancellation provisions contained in the fine print escrow instructions (Exhibit D-L), being Paragraph 16 through 25, provide, in the event notice of cancellation is given by one of the parties to the escrow agreement, in Paragraph 18 and 22 that:

> "In the event said other party shall fail within said thirteen day period to comply with all of the terms hereof, these instructions shall become cancelled and Escrow Agent is thereupon authorized:

> "Fourth: To return all documents deposited hereunder to the party who delivered the same except documents executed by both Seller and Buyer, which shall be marked "cancelled" and retained in the files of Escrow Agent."

and defendant alleges that escrow agent's refusal to return upon demand to F. M. Cocke on Mar. 21 and April 3, 1969 the documents earlier executed by him, and its failure, if any, to cancel and retain the documents earlier executed by both Seller and Buyer, were contrary to and in violation of Paragraphs 16 through 22 of the fine print escrow instructions.

Defendant alleges that Transamerica by violation of the provisions of its own printed escrow instructions as set forth above in this Paragraph IX violated the escrow agreement entered into by it with F. M. Cocke, both for himself and the remaindermen, and alleges that such violation constituted a major breach of its fiduciary duty to F. M. Cocke, both for himself and the remaindermen, and that Transamerica is therefore liable for any damages resulting from such breach of such fiduciary duty and suffered by F. M. Cocke, for himself or the remaindermen.

Defendant further alleges that if any failure of escrow agent to mark "cancelled" as provided by the escrow instructions any instruments executed by sellers and buyers or if any failure to retain same, as so provided, aided or made possible the recording by Buyers of the Agreement and escrow instructions recorded by Buyers on April 2, 1969, escrow agent by such

failure committed a major breach of its fiduciary duty to F. M. Cocke, both for himself and the remaindermen, and is liable for resulting damage.

X

Defendant denies all material allegation of the complaint not specifically admitted herein.

XI

PARTIAL SUMMARY OF ALLEGATIONS OF COUNTERCLAIM AGAINST PLAINTIFFS AND AGAINST TRANSAMERICA AND CROSS-CLAIM AGAINST JOAN H. COCKE

1. That Buyers repudiated the agreements for sale and purchase by making out the note, mortgage and check, representing balances due on trust property, in favor of life tenant Joan H. Cocke, and depositing same in escrow and failing to correct same. Page 15, Line 9.

2. That Buyers repudiated the agreement for sale and purchase by preparation and deposit with escrow agent for F. M. Cocke's signature the deed conveying Parcel 2A and the 1/2 interest in Parcel 1A, constituting a new demand. Page 20, Line 31.

3. That the agreements were cancelled at the close of the 13-day period on Mar. 18 or 19, 1969 (if not before) in accordance with the escrow instructions, by Buyers failure to redeposit the $40,000 note and mortgage or substitute funds in the amount of $20,000, and also by their failure to correct the proposed

payment of trust proceeds to life tenant, before the close of the 13-day period. Page 22, Line 3.

4. That the handing by the escrow officer on Mar. 5, 1969 to F. M. Cocke for his signature of the warranty deed which included Parcel 2A and a half interest in Parcel 1A constituted a major breach of escrow agent's fiduciary duty to F. M. Cocke, amounting to attempted fraud, by the escrow officers aiding in Buyers' attempt to secure F. M. Cocke's acceptance, by signing such deed, of Buyers' new demand. Page 23 Line 4 1/2 and Page 24 Line 1.

5. That Buyers by their recording on April 2, 1969 of the Agreement and Escrow Instructions repudiated such contracts (if not already repudiated by them)by the imposition of extra delay on Sellers, not imposed by such contracts, in removing the cloud on title so cast before Sellers could realize proceeds from a sale of the land title to which was so clouded. Page 25 Line 3.

That Sellers have been damaged by such recording in an amount equal to 6% interest on the value of the land title to which has been so rendered unmarketable, less the rental value to Sellers of the land for its present farming use, from the date of such recording until such cloud be removed by judicial action or otherwise. Page 25, Line 11 1/2.

6. That the amendment to the original complaint, made at the hearing on June 3, 1969 by the Court with the approval of Mr. Tanner for plaintiffs, admitted the falseness of the original allegation

that Joan H. Cocke had executed a deed to the trust 1/2 interest in Parcel 1, and the falseness of the allegation necessarily implied therefrom that payment to her of the proceeds of sale of the trust property was in accordance with the agreements and was lawful and proper. Page 26, Line 19 1/2.

That by escrow officer's letter of March 10, 1969 escrow agent declared such payment to life tenant to be in accordance with the agreements and lawful and proper, and such declaration amounted to gross negligence or attempted fraud. Page 26a, Line 8.

7. That immediately following the June 3, 1969 hearing Mr. Tanner admitted that the deed that F. M. Cocke had actually refused to sign was the deed handed to him by the escrow officer on March 5, 1969, which included Parcel 2A and the 1/2 interest in Parcel 1A (Page 26a, Line 17 1/2);

that Francis M. Cocke had never seen the new deed prepared by Buyers and enclosed in Mr. Tanners' letter to Mr. Riggs until May 16, 1969 at Mr. Riggs office (Page 26b, Line 1); and

that such new deed so prepared and the allegation in the complaint that it is the deed which he refused to sign, are both false, and that such deed was prepared by Buyers, and such allegation made in an attempt to deceive the Court. (Page 26b, Line 5 1/2).

8. That F. M. Cocke executed proper deeds to Parcel 2 and to his undivided 1/2 interest in Parcel 1, describing such parcels as described by the Brown

Engineering survey report attached to the complaint as plaintiffs Exhibit A; and

that such deeds were delivered into escrow by the broker on or about January 24, 1969. Page 27, Line 11.

9. That defendant F. M. Cocke executed 25 releases handed to him on March 5, 1969 by the escrow officer as being all of the releases prepared and deposited by Buyers for F. M. Cocke's signature, but did not obtain copies and is therefore unable at this time to determine in what respects such executed releases differ, if at all, from the 25 releases claimed by Buyers to be the releases which F. M. Cocke has refused to execute. Page 30, Line 11.

10. That Buyers are bound not only by the covenants, expressed or implied, of the Agreement but also those of the Escrow Instructions as later modified by action of the parties and by those of trustee bank's instruction; that Buyers failed to perform as herein set forth; and that later readiness, willingness and ability later expressed by Buyers to later comply with the covenants, terms and conditions agreed to is immaterial because of the agreement for cancellation and their earlier repudiations as herein alleged. Page 30, Line 27.

11. That life tenant, Buyers and escrow agent were all bound by the instructions accompanying trustee Bank's special warranty deed that distribution of the proceeds of sale of the trust property was to be controlled by Joan H. Cocke and Francis M. Cocke, and were all bound by the instructions from resulting trustee

F. M. Cocke (Page 32, Line 4 1/2); and that the payment to life tenant of proceeds of sale of the trust property in violation of such instructions, proposed by Buyers and life tenant and approved by escrow agent, constituted an attempt by all of them to divest the vested interests of the remaindermen in such trust property (Page 32, Line 16); and

that life tenant, Buyers and escrow agent are jointly and severally liable for any loss to the remaindermens' interest resulting from such violations of such instructions (Page 33, Line 29 1/2); and

that such attempt to divest such interests constituted a major breach, whether negligent or fraudulent, of escrow agent's fiduciary duty to F. M. Cocke, both for himself and the remaindermen (Page 33, Line 9); and

that by such breach and the breach of March 5, 1969, by escrow officer's acceptance and handing to F. M. Cocke for his signature of the warranty deed including Parcel 2A and the half interest in Parcel 1A, whether fraudulent or negligent, escrow agent assumed full liability to F. M. Cocke for himself and the remaindermen for all damage suffered by reason of any such breach (Page 33, Line 12 1/2).

12. That as provided by ARS Rule 17(a) Francis M. Cocke as a party to the Property Division Agreement of January 24, 1964 may sue in his own name, as named in said Agreement, for the benefit of the remainderman without joining them in the suits. Page 34, Line 13 1/2.

13. That Transamerica's refusal on March 21 and April 3, 1969 upon demand by F. M. Cocke to return to him the documents earlier executed by him and its failure, if any, to cancel and retain the documents earlier executed by both Seller and Buyer were contrary to and in violation of Transamerica's own escrow instructions, and so in violation of the escrow agreement entered into by it with F. M. Cocke both for himself and the remainderman (Page 34, Line 24); and

that such violation constituted a major breach of Transamerica's fiduciary duty to F. M. Cocke, both for himself and the remainderman (Page 36, Line 23); and

that Transamerica is therefore liable for any damages resulting from any such breach (Page 36, Line 30).

14. That if any failure of escrow agent to mark "cancelled" as provided by the escrow instructions any instruments executed by sellers and buyers or if any failure to retain same as so provided aided or made possible the recording by Buyers of the Agreement and escrow instructions recorded by Buyers on April 2, 1969, escrow agent by such failure committed a major breach of its fiduciary duty to F. M. Cocke, both for himself and the remaindermen, and is liable for resulting damage. (Page 37, Line 1).

WHEREFORE, Francis M. Cocke as defendant, counterclaimant against plaintiffs and against Transamerica, and cross-claimant against defendant Joan H. Cocke prays

as part of the answer that plaintiffs

take nothing by their complaint;

as part of the counterclaim against plaintiffs that the complaint be dismissed for failure to state a claim upon which relief can be granted; and

as part of the counterclaim against plaintiffs and Transamerica and the cross-claim against defendant Joan H. Cocke:

1. that the court rule that the agreements for sale and purchase of Parcels 1 and 2 were repudiated and terminated by acts, or failure to act, of Buyers and that Buyers so abandoned all their rights thereunder.

2. that the Court rule that Transamerica as escrow agent and title insurer has been guilty of multiple breaches of its fiduciary duty to F. M. Cocke, for himself and the remaindermen, amounting to gross negligence or fraud or attempted fraud, and is liable to him for damage suffered by reason of any such breach, for himself and the remaindermen.

3. that the Court rule that Joan H. Cocke as resulting or constructive trustee has been guilty of major breach of her fiduciary duty to F. M. Cocke, for himself and the remaindermen, and has abandoned any advantage, if any, accruing to her as life tenant from the agreements or any of them.

4. that the Court rule that the special warranty deed to all of Parcel 1 executed by trustee Bank be cancelled and returned to trustee Bank.

5. that the Court rule that the $4515

received as earnest money on the trust property be paid to trustee Bank as trust principal or as trust income, whichever to the Court may seem just and meet.

6. that the Court rule that the deeds to Parcel 2 and the 1/2 interest in Parcel 1 executed by F. M. Cocke and on deposit with escrow agent be returned to F. M. Cocke, and that the instruments executed by sellers and buyers be marked "cancelled" and retained by escrow agent, all as in the same manner as provided by the escrow instructions.

7. that the Court rule that the releases executed by Joan H. Cocke and those executed by F. M. Cocke be marked "cancelled" and returned to the party who executed them.

8. that the Court rule that in the proportions to be determined by the Court, Buyers and Transamerica shall jointly pay to trustee Bank and to F. M. Cocke, separately, as damage suffered by them as holder or owner of Parcels 1 and 2, by reason of the cloud on title to such land cast by the recording of the Agreement and Escrow Instructions by Buyers, 13 days after the day on which Transamerica had agreed to mark such documents "cancelled", an amount of money equal to 6% per annum of the agreed sale price of Parcels 1 and 2 for the period beginning March 20, 1969 and ending on the day such cloud be removed by judicial action or otherwise.

9. that the Court grant to this defendant, counterclaimant and cross-claimant such other and further relief as be meet and just in the premises.

RIGGS & RIGGS

By /s/ L. Alton Riggs, Jr.

L. Alton Riggs
2121 S. Mill Ave.
Suite 216
P.O. Box 336
Tempe, Arizona 85281
Attorney for Defendant
Francis M. Cocke

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART COMPANY, Plaintiff, vs. FRANCIS M. COCKE, et al, Defendant	No. C-222472
FRANCIS M. COCKE, et al, Plaintiff, vs. TRANSAMERICA TITLE INSURANCE COMPANY, Defendant.	

Mesa, Arizona
February 27, 1970
10:10 o'clock, A.M.

DEPOSITION OF HENRY KAVANAUGH

Prepared for:

Original - Superior Court

Copies - Individual Attorneys

APPEARANCE:

Mr. L. Alton Riggs, Jr.
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Attorney for (MRS. COCKE)

Elsie Childress
Court Reporter

S T I P U L A T I O N

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled action, through their respective attorney, that the deposition of HENRY KAVANAUGH herein, may be taken upon cross examination as an adverse party by the Plaintiff, before ELSIE CHILDRESS, a Notary Public and Court Reporter, in and for the County of Maricopa, State of Arizona, in the offices of JOHNSON, SHELLEY, ROBERTS & RIGGS, 48 N. Mcdonald Dr., Mesa, Arizona, on the 27 day of February, 1970, commencing at the hour of 10:10 o'clock, A.M.

IT IS FURTHER STIPULATED that all objections as to form of questions or answers and except as to errors which might be obviated or cured at the time of the taking of the deposition are reserved until the time of trial.

IT IS FURTHER STIPULATED that the witness may read and sign the deposition at the end thereof, and that the requirements of the statutes relating to the return of and notice of filing of the deposition are waived.

- - - - - - - - - - - -

Mesa, Arizona
February 27, 1970
10:10 o'clock,A.M.

MR. RIGGS: Mr. Kavanaugh, I am sure you have had your deposition taken many times?

WITNESS: Several times.

MR. RIGGS: You are aware of the nature of the deposition?

WITNESS: Yes.

Whereupon,

HENRY KAVANAUGH

a witness of lawful age, being first duly sworn, upon his oath by the Notary to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. RIGGS:

Q. Would you please state your name?

A. Henry Kavanaugh.

Q. Would you tell us what company you are affiliated with?

A. I am Escrow Agent - Officer - of Transamerica Title Insurance Company.

Q. How long have you been so engaged?

A. Seventeen and-a-half years.

Q. Were you Escrow Agent of the Account 0201311-7, the parties of which is Francis M. Cocke, divorced man, Joan Cocke, divorced woman, and James Stewart Company, Arizona Corporation and/or the nominees?

A. I was - or, I am.

Q. Was this Escrow dated October 9, 1969?

A. It was.

Q. Was it signed by four parties?

A. Yes.

Q. Do you recall the names of parties?

A. Francis M. Cocke, Joan Cocke, Mr. Tanner, in behalf of the Buyer.

Q. Was there anyone else who signed that; was it D. R. Burton?

A. Yes; he was the real estate broker.

Q. Do you have copies of the escrow with you?

MR. GILLENWATER: I do.

MR. RIGGS: Do you have the original with you?

MR. GILLENWATER: I do.

MR. RIGGS: I wonder if Counsel would mind handing the Deponent the copy?

MR. GILLENWATER: Off the record.
(Discussion off the record)

MR. RIGGS: Back on the record.

Q. (By Mr. Riggs) I would like you to have those for reference to the questions I will ask.

Were the escrow instructions together with the sales agreement, dated October 9, 1969, considered to be the total contract for the sale of the property described therein?

MR. GILLENWATER: I will object to the form of question; it calls for a legal conclusion. You can go ahead and answer.

WITNESS: According to the terms of the escrow, these instructions under certain sales agreement entered into October 9, between the Buyer and Seller, constituted a binding agreement set forth in the escrow. Is that what you had reference to?

MR. RIGGS: Yes sir; thank you.

Q. (By Mr. Riggs) From the escrow agreement, would you -- what land parcels, number 1 and 2?

A. Yes.

Q. Was the escrow agreement closed on December 15, 1968?

A. Yes.

MR. GILLEN: Could we have the record show all objections, except to form and foundation, will be reserved until time of trial?

MR. RIGGS: Yes.

Q. (By Mr. Riggs) I wonder, for the purpose of the record, would you read the fine print under instruction, number 33?

A. Time is of the essence of any agreement to pay or perform hereunder which agreement shall remain unpaid or unperformed as of close of escrow. No payment by buyer or mortgagor of such amounts shall be received or receipted for by Escrow Agent unless all amounts due as of the

date of compliance are paid unless and until written authority therefor has been delivered by Escrow Agent by the payee of said amount.

Q. I think that is the instruction in all your escrow agreement.

A. I believe that is true.

Q. Do you have any idea or know why the escrow did not close as scheduled on 12/15/68?

A. One of the main reasons, I would say the inability of Mr. and Mrs. Cocke to give me instructions compatible to each of them regarding the deed, I requested and received from the First National Bank, which one of the title requirements.

Q. Was that the only reason it didn't close, in your estimation?

A. We had the deed Mr. Cocke had given us; to which we felt was uninsurable, but I would say, probably the main reason, was the failure of parties to agree.

Q. Had Mr. Cocke put certain releases in escrow by the 15th of December, 1968, as required by the escrow instructions?

A. I don't know if he put it in at that time, or until later, they were put in.

Q. Did you prepare those releases, or Mr. Cocke?

A. As I recall, it came from Mr. Tanner's office.

Q. You are not certain what date they were put in escrow?

A. No response.

Q. Would you have notes that would tell you?

A. I may have correspondence that would tell me.

Q. I wonder if you will take a moment to check that, please?

A. I received them on the 25th of February, 1969.

Q. What indication do you have that they were received on February 25th?

A. I have a cover letter from Wallace O. Tanner dated the 24th, stamped received by us at 8:00 o'clock, as of the 25th.

Q. Are you acquainted with the other escrow instructions not directly related to this escrow or Court reference to Fannin escrow covering the same property?

A. Yes. I was aware there were copies of escrow instructions on file. In fact, I think, we made the requirement as a result of those.

Q. Did Transamerica take the document of that because of the cloud of title in the escrow instructions 0201311-7?

A. It appeared to us there was such a cloud, and as a result of those instructions, we felt we should have a quitclaim deed or something similar, from Fannin, -

the Firm of Fannin - which was later deposited to escrow.

Q. Who was the description made by?

A. The Title Department or the Executive area.

Q. Subsequent to knowing about this cloud on the title, did you learn of a mutual agreement between Mr. Fannin and Mr. Cocke?

A. I did.

Q. Do you know whether or not Francis M. Cocke entered a 13 day cancellation notice as early as February 13, 1969?

A. He filed one on the 3rd of February, 1968, it appears.

Q. Is there any cancellation he noticed subsequent to December 3, and March 5, 1969?

A. That is the only two.

Q. Do you know the reason for the first cancellation in December of 1968?

A. I believe it was due to the fact there was $44,000, coming to the escrow as of the first of December.

Q. Had that not come by the first?

A. It had not.

Q. Of course, that was the duty of the Buyer to get it in there by December 1st?

MR. GILLENWATER: I will object. It calls for a legal conclusion. The Document speaks for itself.

You may answer.

WITNESS: The escrow instructions call for it, that on or about December 1, 1968, $44,000, to be deposited in escrow.

Q. (By Mr. Riggs) On or about January 10, did you meet Mr. Francis Cocke and some other party to this transaction, in connection with Mr. Cocke's drawing out some money?

A. I did.

Q. Who was present at that time, do you recall?

A. As I recall, Mr. Tanner, Mr. Cocke, and Mr. Burton.

Q. Where was that meeting held?

A. At my office.

Q. Do you recall the approximate time of the day it was held?

A. I believe it was in the afternoon.

Q. You do recall it was on January 10th?

A. I couldn't recall the exact date.

Q. On that day, did you make out and deliver a check to Francis M. Cocke, and Joan Cocke?

A. Yes.

Q. What was the amount?

A. Twenty thousand dollars ($20,000).

Q. Whose funds was the check drawn on?

A. The escrow account. Is that what you have reference to?

Q. Yes. In connection with that, did you write up a little amendment to the escrow instructions on that date?

A. I did.

Q. Do you have the original of that?

A. Yes.

Q. For the record, would you read that?

A. 'You are hereby instructed to release from the funds deposited by the undersigned, the sum of $20,000, payable to Francis M. Cocke, immediately prior to closing of escrow; it being understood that you are not in any way to be held liable for return of these funds,

Should the escrow fail to close, for any reason, whatsoever'. Signed by James Stewart, Wallace O. Tanner, and properly, by Francis M. Cocke.

Q. Is that the check that you delivered to Mr. Cocke? Did he execute the Note and Mortgage?

A. Yes, he did.

Q. Do you have the original of the Note and Mortgage?

A. I do not.

Q. Did you receive it that day?

A. Did I?

Q. Yes.

A. No.

Q. Do you know in whose custody it is?

A. Mr. Tanner.

Q. In what amount?

A. Forty thousand dollars, ($40,000).

Q. Did you consider the $20,000, that was given to Mr. Cocke, to be part of the escrow fund?

A. I did.

Q. Did you consider the $40,000, Note and Mortgage Documents a part of the papers of the escrow?

A. I did not.

Q. What was the reason for that?

A. I had nothing to do with it. It was strictly between Mr. Tanner and Mr. Cocke.

Q. Did the other parties to the escrow instructions approve this advance to Mr. Cocke?

A. No, sir.

Q. Why didn't they approve it?

A. I didn't require it, because it was cash payment; not earnest money, nor forfeitable. As far as I am concerned, James Stewart Company could have withdrawn the $44,000 at any time.

Q. Then, it is your position, the Note and Mortgage never did get back in escrow?

A. I never had any instructions for it.

Q. Then, it was sort of a verbal agreement to this $20,000, the way it was written -- is that right, no agreement in writing, other than the Note and Mortgage to back it up?

A. Well, I had my instructions. I read the instructions, instructing me to write Mr. Cocke a check for $20,000. That is all the instructions I had.

Q. Then, it was agreeable to the James Stewart Company - they were agreed to by them?

A. Oh, yes!

Q. I wonder if you would, for the record, read the fine print of the Instructions 2, of the escrow instructions?

A. 'SELLER and BUYER: Will deliver to escrow agent all documents, pay to escrow agent all sums and do or cause to be done all other things necessary in the sole judgment of escrow agent, to enable him to comply herewith, and to enable Transamerica Title Insurance Company to issue any Title Insurance policy provided for, herein'.

Q. Don't the "Things" under number 2, all documents, would have included the Note and Mortgage?

A. As I stated, it was strictly between them, what security Mr. Tanner wanted for money, or what Mr. Cocke was willing to give Mr. Tanner.

It had nothing to do with escrow. I had all I could do to account for the money.

That is all the instruction I had for money given into my safekeeping.

Q. I think we have asked this question before, but if the escrow were otherwise ready to close, is it your position the escrow could close without the Note returned to Mr. Cocke, without the advance, and be washed out?

A. Absolutely.

Q. At any time subsequent to December of 1968, were Mr. and Mrs. Horne ever nominated as Purchaser, under the escrow number 02013111-7?

A. I don't recall the exact date. On January 2, I was advised.

Q. Were Mr. and Mrs. Horne both named as nominees, at the time?

A. Yes; two respective interests. I think he was to get 75%, as sole, separate property, and she was to get 25%, as sole, separate property.

Q. Is there any instrument other than

the letter of January 2, 1969, for proof of that?

A. Yes.

Q. Is that written to you from James Stewart Company under James Stewart and Seth Horne's signature?

A. Yes.

Q. Are there any documents or instruments that you know of, other than the letter, in which he was named as nominee?

A. I don't believe it was put in.

Q. What I am wondering is, if they passed a resolution; if you received anything besides the letter?

A. I don't believe I have. No, I am sure I haven't.

Q. Did you notify Mr. Cocke of this nomination, at any time?

A. I would assume so. I don't recall the time or date. We had quite a few conversations subsequent to that time. I presume it came out in the conversation.

Q. Did you, by any written instructions, notify him, of your own knowledge?

A. I don't believe so.

Q. Did you receive a special Warranty Deed from the First National Bank of Arizona, as Trustee, in the Fall of 1968?

A. I did.

Q. Do you have the original deed in your file?

A. I should have; yes.

Q. Would you check it against my copy?

A. Yes.

Q. Did you, with the Deed, receive a letter of instructions signed by the Trustee Officer?

A. I did.

Q. I wonder if you have a copy of that letter here, also?

A. (Witness looks through file)

Q. Referring to the second paragraph, did that letter instruct you to place the Deed in escrow; executed by the parties, according to the rule governing distribution of sale, of funds, cosigned by Francis M. Cocke?

A. Yes.

Q. What interest in Parcel 1, did that grant, all or half interest in Parcel 1?

A. It granted all.

Q. Do you recall if Mr. Cocke objected to the Deed granting all of Parcel 1?

A. I do.

Q. Do you know why?

A. He didn't own it all.

Q. What did you tell Mr. Cocke at that time?

A. As far as I was concerned for Title Insurance, the permanent Deed was sufficient. They had given all they had. They aren't retaining anything.

Q. Then, you are aware in your own mind, the Trustee only had half interest in Parcel 1?

A. That is right.

Q. From your standpoint of the Title, is there any objection to Trustee Deed?

A. No.

Q. Do you remember on a certain date in March, Mr. Cocke executed a number of releases presented by the Buyers?

A. Yes.

Q. Do you recall the date - was it March 1st?

A. I don't recall the date.

Q. I wonder if you have some of the releases that you might have the date?

A. That is what I am looking for. I don't even have the release. Yes, they were acknowledged before on March 5, 1969.

Q. Had you, prior to March 5, notified Mr. Cocke that the release had been received into escrow?

A. I don't recall.

Q. Are these copies of the release that you have there?

A. Yes, I am sure they are.

Q. Thank you. Do you recall how many releases there were?

A. I don't recall the exact number, no.

Q. Was it twenty - something like that?

A. Something like that, yes.

Q. As Mr. Cocke signed the release, did you hand him to sign the Deed, that was prepared for the purchase by the Buyer?

A. Yes.

Q. Do you have that Deed?

A. Yes, I believe this is the one here. I remember one Deed that had four parcels on it.

Q. You are referring to Parcels 1, 2, and 1A, and 2A?

A. Right.

Q. Do you recall if that was delivered to Mr. Cocke on the 5th of March?

A. I could be wrong, but as I recall, it was at an earlier date, and he objected to it. I believe I called Mr. Tanner that same day.

Q. Do you recall, if in your presence,

he was advised what the objection --

A. It was never his intention to warranty a portion of both of them, Mr. Tanner advised me it was an error. He had offered to give him whatever interest he had. I didn't inspect it, and requested that he prepare a quitclaim for 1A and 2A, which he did.

As I recall, I asked him to sign those two at the time of release. I think that is about the last time we had conversations regarding these documents. I believe Mr. Cocke filed notice of cancellation. I don't think anything was signed or asked to be signed.

Q. On March 5, when you handed him the Deed, are you saying you are not sure you handed him the Deed to 1A and 2A?

A. I believe it was quitclaim.

Q. At any time, did you hand him the Warranty Deed to Parcels 1A and 2A?

A. I believe I gave it back to Mr. Tanner, when he refused to sign.

Q. You think this was prior to March 5?

A. I am a little hazy on that.

Q. This could be March 5th, when you presented this to Mr. Cocke, possibly?

A. Probably or possibly.

Q. You are saying it is possible, not probable, that you handed this to Mr. Cocke

on March 5? You didn't hand him the Deed to Parcel 1, 1A, 2 and 2A?

A. Right.

Q. When you did hand, whatever date it was, you handed Mr. Cocke a Deed for Parcels 1A and 2A. Did you, at that time, make copies of that for Mr. Cocke to take with him?

A. I very well possibly could have. I made copies of various documents Mr. Cocke asked me to make for him.

Q. Did you ever, at any time, then, present an amended Deed or new Deed to just parcels 1 and parcels 2, to Mr. Cocke?

A. Yes.

Q. When would this have been?

A. As I recall, that was the last time I had asked him to sign anything, which would probably be on the 5th of March.

Q. Was there already in escrow his Deed for Parcels 2, and his half interest in 1?

A. Yes. He had prepared a Deed, or somebody prepared a Deed, that he signed.

Q. Do you recall when that was received by you, or Transamerica Title Company?

A. I would say, probably before the first of the year, '69; right around that time.

Q. Did Transamerica have any objection to Francis Cocke's Deed to his half interest in Parcel 1?

A. Yes. We felt Parcel 1, was alright, but Parcel 2, I think there was a little triangle down there in the southwest corner.

The engineer prepared the map and description, and did not feel we could insure.

Q. Parcel number 1, didn't the land go to the water's edge?

A. I may be confused. There is one that went down to the ditch, the one where he and his wife, both, had an interest, I imagine.

Q. Parcel 1 was alright?

A. One Deed was okay, and - the one he and his wife had an interest in the property was alright. The other parcel, we felt was insufficient.

Q. The reason you felt it was insufficient was because of the small triangle?

A. Yes.

Q. Everything except the little triangle was alright?

A. That is what I was given to understand.

Q. Was this objection to this triangle based on the objection by Mr. Wagoner, of the Title Company?

A. Yes.

Q. I think you stated, Mr. Cocke did not sign the Warranty Deed?

A. He did not sign that one, but he signed another.

Q. Did he on the 5th of March execute effective notice of cancellation?

A. He did.

Q. Do you have a copy of that in your files?

A. I do.

Q. Is this it? May we look at it?

A. (Handed copy to Mr. Riggs)

Q. Did you notify the Buyer by telephone of the cancellation?

A. No, I don't believe so. Mr. Tanner called saying that he had received it - or maybe he called saying he was sending in the Mortgage and funds due. I am a little hazy.

I do know I did talk to Mr. Tanner regarding this, but I can't recall whether or not it was mentioned in the conversation. I don't believe I made a specific call to Mr. Tanner that it was being sent. I believe, I advised him only as a matter of conversation.

Q. I see. At one time you did call him about the Deed to Parcels 1A and 2A?

A. Yes, I believe I called him in Mr. Cocke's presence. That is when he refused to sign the Deed, because it required a Warranty Deed on 1A and 2A.

Mr. Tanner was very apologetic. He said it was never his intention, strictly a lack of communication between him and his secretary. He didn't check it over as closely as he should have.

Q. At the time you talked to him, you remember you talked to him about this cancellation time; you talked to him about 1A and 2A?

A. As I recall, it was different -- seems to me 1A and 2A, came up prior to the 5th of March. As I said, I am hazy.

Q. I want to draw your attention to this letter. Was that written when you talked about, a while ago, the letter sent to you of March 5, sent to your attention, regarding this escrow 02013111-7, written by Maurine D. Horne and also Mr. Seth Horne; which in paragraph 2, - I want for the purpose of the record, I wonder if you would read paragraph 2 on the first page.

A. 'Releases have been provided for all acreage, except Parcels 1A and 2A, which we understand are to be Deeded to Buyer, at the close of escrow. Parcels release properly executed by Francis M. Cocke and Joan Cocke, are to be held by Title Company and released to Buyer as payments are made to the First National Bank of Arizona.

Enclosed you will find Buyer's checks, each in the sum of $32,000, made

payable to First National Bank of Arizona in conformity with the agreement between Mr. and Mrs. Cocke.

You are authorized to deliver these sums to the First National Bank, when you have accomplished the following ...'

Q. There are several requirements on the page--

A. 'Have record Deed and Mortgage, which Deed is to include a Deed to Parcels 1A and 2A, to the Buyers.

Q. It appears they were requiring these Deeds to Parcels 1A and 2A, doesn't it?

A. It appears that way.

Q. Yet, escrow didn't call for Deeds to Parcels 1A and 2A?

A. That is right.

Q. What would be your thoughts regarding that paradox?

MR. GILLENWATER: I object to the question. It is unintelligible. I am going to instruct him not to answer.

MR. RIGGS: Your Attorney has instructed you not to answer. He has objected for the record. Under instruction, you don't have to answer, at this time. You realize, we can file a petition with the Court to make an order for the production of this type of answer.

Do you still take your Attorney's advise not to answer?

A. That is what we are paying him for.

MR. GILLENWATER: Let the record show you are at liberty to rephrase the question.

MR. RIGGS: I will rephrase the question.

Q. (By Mr. Riggs) According to escrow instructions, I believe you previously stated, the escrow instructions only called for a Warranty Deed and delivery of Parcels 1 and 2, by Mr. Cocke?

A. Yes.

Q. Yet, in this letter written - requirement number 4, states, that they asked you to have record Deed, Mortgage, which Deed is to include Deed for Parcels 1A and 2A, to the Buyers.

A. Yes.

Q. Is that not different than the escrow instructions?

A. That is right.

Q. It is not in accordance with the escrow instructions?

A. That is right.

MR. GILLENWATER: I will object to the form of the question.

Q. This language would also back up Warranty Deed delivered to you, which includes Parcels 1A and 2A?

A. I don't understand.

Q. Requirement number 4, have record Deed and Mortgage, which Deed is to include Deed to Parcels 1A and 2A, to the Buyer. That was to back up enforcement of Warranty Deed they sent to you, which you showed to Mr. Cocke, which applied to Parcels 1A and 2A. Would that be correct?

A. 1A and 2A was quitclaim. It never was a part of the escrow agreement; made between them outside. If the property came down to the fact all terms were complied with, and Mr. Cocke refused to sign quitclaim Deed, I believe, I would probably have closed escrow without 1A and 2A.

Q. Did you send Mr. Cocke a copy of the March 5 letter you received from Mr. and Mrs. Horne?

A. I did.

Q. When did you send that to them?

A. I sent it on March 10th.

Q. May we see that letter of March 10?

A. My copy.

Q. Do you feel that in writing in the requirement in number 4, in the Buyer's letter, where they are putting on extra conditions to that escrow, do you feel they have complied with the escrow; that actually they were making a counteroffer?

MR. GILLENWATER: I object to the form of the question; calls for a legal conclusion of this witness.

You may go ahead and answer.

WITNESS: He is objecting.

MR. RIGGS: He has objected to the form of the question. That is a proper objection. You may answer.

WITNESS: Well, I felt and I still feel, in essence, the Buyer had done everything that he possibly could to close the escrow.

Prior conversations with Mr. Cocke, he had voluntarily offered them this Parcel 1A and 2A. As I said, I couldn't insure Title. He probably had Title by adverse position, and the engineer, who made the description out, merely threw that in. It was never a part of the considered sale price. It was based on the netable acres, and if you want to give it to him, fine and dandy.

As far as I was concerned, it was never a part of escrow, despite what Mr. and Mrs. Horne said.

If I had been in a position to close I would have asked for clarification. Mr. Cocke had refused to sign quitclaim Deed. I would have closed on that basis. I would have closed the escrow.

Q. In the letter to Mr. Cocke there, of March 15, you mention checks and documents?

A. Yes.

Q. I notice there are 3 Promissory Notes here, one in the amount of $265,587.21; and $77,308.93, and a third, $77,308.93; but the Notes are not complete on the face. They don't evidence dates. What would be

the reason for that?

A. That, I don't know.

Q. Is it customary for them to send you the Notes and you want to insert the date when it --

A. Probably the Note is dated, and the Mortgage dated, and in as much as it was only March 5, I probably inserted the 5th of March on those Notes.

Q. Also the body of the Note, I mentioned, wasn't filled out, where it said insert date of payment.

A. According to escrow instructions I had, I would insert those dates. Interest was to start from date of closing of escrow.

Q. Those checks were dated March 7, is that correct?

A. Yes.

Q. Subsequent to this time, other than March 31, and April 1, did you write certain letters to Mr. Cocke?

A. I recall a letter. What do you have in mind?

Q. In those letters, March 31, you suggest a certain meeting for 2:00 o'clock, Wednesday, April 2, in your office to resell the impairment impasse, is that correct?

A. Yes.

Q. Did a meeting ever occur?

A. It did.

Q. Was Mr. Cocke there?

A. He was not.

Q. Who was present, at the time?

A. Mr. Tanner, Mr. Howard, Mrs. Whitney, and Mr. Horne. I believe they were the only ones that were present.

Q. Can you tell me, best you recall, what happened at that meeting?

A. It was sort of one-sided, I believe. As far as I was concerned, nothing was accomplished.

Q. You don't care to elaborate any further?

A. No.

Q. Did you write any other letter to Mr. Cocke, during the 13 day period?

A. I don't recall.

Q. Would you mind just looking to see, if you had written him a letter during the 13 day period?

A. I don't find a copy of such letter in the file. Do you have a copy that you want to make reference to?

Q. No. Did you receive any further instructions during the 13 day period, either from Mr. Cocke, or the Hornes?

A. No. Mr. Cocke came in at one time,

I think. This time, he was bringing witnesses, and said, as far as he was concerned, - he asked for the documents back, and I refused to give them to him.

I told him, I felt the escrow had not been cancelled. He said, as far as he was concerned, it had been. That was the gist of the conversation.

Q. No specific instructions?

A. No. I think he wanted copies of various documents, that I had.

Q. When Mr. Cocke came in to you with witnesses, did a Mr. Daniel come with Mr. Cocke?

A. There was a gentleman with him, I recall.

Q. Wasn't this after the 13 day period?

A. Yes. I think he came and talked to my secretary, asked her for documents. She refused to give them to him.

Q. He did make a written and oral request for papers to be returned to him?

A. He may very well have.

Q. On, or about, April 3, 1969?

A. Yes.

Q. At that time, did you then refuse to deliver the papers and sign your name?

A. Yes. I made copies of them, xerox copies of the letter.

Q. I show you a xerox copy, is that your signature on the refusal?

A. That is right.

Q. I wonder if you would read for the record, with reference to the escrow instructions again, Numbers 16 and 25?

A. CANCELLATION: If either party elects to cancel these instructions because of the failure of the other party to comply with any of the items hereof within the time limits provided herein, said party so electing to cancel shall deliver to escrow agent a written notice to the other party, and escrow agent demanding that said other party comply with the terms hereof within 13 days from the receipt of said notice by escrow agent, and that these instructions shall thereupon become cancelled.

Q. In number 16, the word there - with any of the items - that would be "terms"?

A. Yes.

Q. Would you read that other number 25, please?

A. "Not withstanding any of the provisions herein, escrow agent is hereby instructed that any payment of money due under a cancellation notice shall be accepted, unless said payment is tendered in cash, certified or cashier's check, or money order. Personal checks are not to be accepted as payment in these circumstances, unless provided by the party seeking cancellation, or approved---".

Q. Those checks you received, are those personal checks?

A. They are.

Q. They are not certified or cashier's checks?

A. They are not.

Q. They are not money orders?

A. They are not.

Q. I believe you stated before, at one time, you notified Mr. Cocke the triangle was unissued regular Title under provisions of number 2, because of the triangle?

A. That is right.

Q. Would you read escrow instructions numbers 24, 18, and 22?

A. "In the event said other party shall fail within said 13 day period to comply with all terms hereof, these instructions shall become cancelled and the escrow agent ..."

22 - "Failure to return all documents deposited hereunder to the party who delivered the same, except documents executed by both Seller and Buyer; shall be marked 'cancelled' and retained in the files of escrow agent."

Q. 24?

A. "If escrow agent is unable or unwilling to comply with these instructions for any reason, other than cancellation as hereinbefore provided, and if Transamerica Title Company is unwilling to issue any Title Insurance Policy provided for herein, escrow agent is directed to pay the charges

payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charge payable by Seller from any money deposited hereunder by Seller, paying the balance then remaining to Seller, all documents executed by one party only on deposit with escrow agent shall be returned to the parties who executed said documents, mutually executed instruments shall be retained by escrow agent".

Q. Did Mr. Cocke have any money on deposit in escrow?

A. Mr. Cocke, no.

Q. I believe you said some notes and Mortgage referring to a balance on Parcel 1, is that correct?

A. Yes.

Q. Who were they made out in favor of?

A. Parcel 1, I believe was owned jointly by Mr. and Mrs. Cocke.

Q. Who were those Notes made payable to?

A. Payable to them, also.

Q. Mr. and Mrs. Cocke -- maybe I got the parcels mixed up. This is one Note here for $77,308.93, appears to be made out solely to Joan Cocke. What is the reason for that?

A. That is in compliance with escrow instructions.

Q. Isn't the Title Trust portion of deferred balance?

A. According to instructions, as I recall, Mortgagor is Francis and Joan Cocke, and on one, the Mortgagee is Francis Cocke.

Q. In your opinion, do you think the instructions from the Trustee modified that?

MR. GILLENWATER: I object to the form of the question, calls for a legal conclusion.

MR. RIGGS: You can go ahead and answer.

A. Of course what the Trustee says -- I can't see how I can keep modifications from a third party. I have trouble enough with two parties. I would say, "No", in my opinion.

MR. RIGGS: I have nothing further.

CROSS EXAMINATION

BY MR. TANNER:

Q. The two checks that were referred to in the letter, included Notes and Mortgage, each in the sum of $32,000, were Notes and checks due under escrow instructions?

A. No.

Q. This was an annual payment that was to come due afterwards?

A. Yes.

Q. When Mr. Cocke saw the Warranty

Deed, which had been prepared by you, that included Parcels 1A and 2A, and objected to signing it; it is the truth, isn't it, that he stated at that time, he would agree to give a quitclaim Deed but not a Warranty Deed?

A. Yes.

Q. And in conformity, you did call me immediately regarding that?

A. Yes.

Q. And I immediately delivered to you a quitclaim and Warranty Deed?

A. As I recall, that is correct.

Q. Did Mr. Cocke ever prepare a Promissory Note and Mortgage for submittal for Mr. and Mrs. Horne, which he requested to be signed by them?

A. Not to my knowledge.

Q. Did he prepare any documents that were to be signed by Mr. and Mrs. Horne?

A. He did not.

Q. Were you present when he had any conversation with me, or anyone else, concerning preparation of these documents?

A. I could have been; I don't recall the gist of the conversation.

Q. Do you recall having conversations with me regarding what form these documents should be in?

A. Yes.

Q. On several occasions?

A. Yes.

Q. And my request for you to try to obtain some type of instructions from Mr. and Mrs. Cocke, so we could prepare the forms?

A. Yes.

Q. Do you recall ever having conversation regarding what form these documents should be in, who payable to, etc.?

A. Yes.

Q. And who the Notes and Mortgages were to be made payable to, who checks were to be made payable to?

A. Right. You did the only thing -- I can tell you what escrow instructions states, that is what you did.

Q. If we were going to submit documents without instructions, we would have to agree, is that correct?

A. That is right.

MR. TANNER: No further questions.

CROSS EXAMINATION

BY MRS. WHITNEY:

Q. Mr. Kavanaugh, did Joan Cocke Execute the release required of her and deliver to escrow?

A. Yes.

Q. Did she execute quitclaim Deed to Parcel 1A?

A. She did.

Q. Excepting, then, for a mutual agreement with Mr. Cocke, if such could be obtained, she had performed everything that was required of her in this escrow?

A. In my opinion.

Q. Did Mr. Cocke ever prepare some instructions for his signature, concerning distribution of the funds?

A. I believe he did.

Q. Do you have a copy of that?

A. (Searching files)

Q. Would it help, if I gave you the copy I have?

A. Yes.

Q. (Copy handed to witness)

Is this the document which Mr. Cocke signed, entitled 'Escrow Instructions', to escrow agent by Joan H. Cocke and Francis M. Cocke?

A. Yes.

Q. Except for the red line?

A. Yes.

Q. It is dated January 21, 1969, is that correct?

A. It is.

Q. Do you remember discussing this document with him?

A. Yes.

Q. Do you recall that I advised you that the figure set forth on the second part entitled, 'Agreement or Distribution of Funds' was correct as to the amount and percentage?

A. Yes.

Q. It was not correct with respect to the fact Mr. Cocke prepared it for Mrs. Cocke's money to be paid to Joan H. Cocke and to him, jointly?

A. I remember.

Q. Do you further recall that I contacted the First National Bank and so advised them; do you recall my letter of February 26, and do you have the original, which was signed by Joan H. Cocke?

A. I believe I do; yes, I have.

Q. Do you also remember that a copy of this letter was sent to the First National Bank as shown at the bottom of the letter on page 3?

A. Yes.

Q. This was at the Tempe Branch of the Bank. It was sent to the attention of Mr. Brown?

A. Yes, you sent it to the attention of Mr. Brown.

Q. Do you have a copy of Mr. Brown's letter dated March 3, 1969, in which he advised me that in view of the instructions, the First National Bank would be third party only in the duty of normal collection, as should be the transaction of the Title Company?

A. I recall the letter. I don't seem to have a copy.

Q. That copy was sent to you?

A. Yes. I don't recall--

Q. You recall the contents of the letter?

A. Yes.

Q. As a result of this letter, would you say, therefore, you were unable to determine in your escrow, to whom to pay the money and in what amount?

A. That is right.

MRS. WHITNEY: I believe that is all.

CROSS EXAMINATION

BY MR. GILLENWATER:

Q. Mr. Kavanaugh, as I understand it, you got a Trustee Deed from First National Bank?

A. Yes.

Q. Delivered to you --

A. Yes.

Q. Authorizing you to use the Deed, when you received further instructions from Mr. and Mrs. Cocke?

A. That is right.

Q. Were there ever any further instructions received by you, that were agreed upon by Mr. and Mrs. Cocke?

A. No.

Q. Was that what held up the closing of escrow?

A. Ninety-nine and nine-tenths per cent.

Q. Were you able then, to use the Deed from the First National Bank to close escrow prior to receiving those instructions?

A. No.

Q. So, regardless of how the check had been made, would have been made, could have been made, you still could not have closed escrow, until you received subsequent collections from Mr. Cocke?

A. That is right.

Q. And no further instructions were received?

A. No.

Q. I take it, that Mr. Cocke had, did

request one 13 day Notice in December?

A. Yes.

Q. His objection at that time, was cured?

A. Yes.

Q. Then, he required a second 13 day Notice. What was his reason for requesting that?

A. He told me he was tired of being jockeyed around, and he would serve another Notice.

Q. Did those Notes and letter from Mr. Tanner, and Mortgage, cross in the mail?

A. Yes, I believe they did.

Q. Were the Buyers having difficulty in determining from Mr. and Mrs. Cocke, how the Documents, Notes and Mortgage and Check should have been delivered?

A. I would think they had.

Q. Did they indicate that to you in the letter?

A. Yes.

Q. To your own personal knowledge, were the Buyers ready, willing and able to close this escrow, before the 13 day Notice and afterward, and during the 13 day Notice?

A. As far as I know, they still are.

MR. GILLENWATER: I have nothing further.

REDIRECT EXAMINATION

BY MR. RIGGS:

Q. Did you receive specific instructions to make the check directly payable to Mrs. Cocke?

A. I did not.

Q. Could it have been just as easy to make the check jointly to Mr. and Mrs. Cocke, and then let them fight out their differences?

A. I had instructions from the Bank. It was pretty specific. I was to get mutual instructions from them as to how the disbursement of funds was to be handled. It was never forthcoming. Is that what you have reference to?

Q. In the light and on the face of that, still the check was made out directly to her?

A. No. All checks were made payable to First National Bank of Arizona, Tempe, for the account for Joan Cocke.

Q. That wouldn't have required Francis M. Cocke's endorsement?

A. No.

Q. Although made to the Bank for her benefit, nothing was accrued to him?

A. He had a check made to him for the same, or greater amount - no, same amount.

Q. Was the Tempe Bank Trustee?

A. They were to be set up as collection agent, as Mr. Cocke's agent. He didn't want us to get our hands on his money.

MR. RIGGS: I don't have any further questions.

RECROSS EXAMINATION

BY MRS. WHITNEY:

Q. Do you recall what date Joan Cocke signed the release?

A. February 27.

Q. February 27th, the same date as that letter.

MR. GILLENWATER: What is the date?

MRS. WHITNEY: February 27.

Q. (By Mrs. Whitney) Mr. Kavanaugh, go back to the letter of instruction from the Bank, that came with the Deed. Will you read that particular paragraph, if you can find it again?

A. And in accordance with further instructions governing distribution of proceeds of sale, to be forwarded to your company by Joan H. Cocke and Francis M. Cocke.

Q. Doesn't say mutual or jointly?

A. Right.

Q. Did Joan Cocke, through me, give you instructions with reference to distribution of funds to her?

A. She did.

MRS. WHITNEY: That is all, thank you.

MR. RIGGS: It appears that Joan H. Cocke was notified some time before February 27, on that date she was notified, why wasn't Mr. Cocke notified until March 5th?

WITNESS: I don't recall.

MR. RIGGS: Thank you very much.

(Thereupon, at 11:40 o'clock, the deposition was concluded)

- - - - - - - - - - - - -

County of [illegible] A [illegible] that the within instrument was duly recorded

In DOCKET and indexed in deeds

at the request of

When recorded, mail to:

Witness my hand and official seal.

, County Recorder,

By Deputy Recorder

Fee No.

Compared
Photostated
Fee:

WARRANTY DEED

For the consideration of Ten Dollars, and other valuable considerations, Parcel 1

hereafter called the Grantor, whether one or more than one, hereby conveys to

the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:

An undivided one-half (½) interest in 49.5023 acres of land within the limits of the City of Tempe described as folows:

(PARCEL NO. 1) That part of the East half (E½) of the Southeast quarter (SE¼) of Section twenty (20), Township one (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Beginning at a point on the East line of said E½ SE¼ of Section 20, where said East line intersects the middle of the George Ditch, which bears S.0°20'17"E. 323.50 feet from the Northeast corner of said E½ SE¼ of Section 20; thence S. 0°20'17"E. 1806.47 feet along the East line of said E½ SE¼ of Section 20 to the North bank of the Jenkins Ditch; thence N.88°40'37"W. 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said E½ SE¼ of Section 20; thence N.0°07'25"W. 1381.50 feet along the West line of said E½ SE¼ of Section 20 to the middle of the George Ditch; thence N.68°31' 41"E. 399.54 feet along the middle of the George Ditch; thence N.67°40'43"E. 211.50 feet along the middle of the George Ditch; thence N.76°59'43"E. 375.20 feet along the middle of the George Ditch; thence N.80°57'10"E. 195.15 feet along the middle of the George Ditch; thence N.75°14'43"E. 206.00 feet along the middle of the George Ditch to the point of beginning, subject to existing rights of way and easements for roads, ditches and public utilities; and subject to the encumbrances shown on the reverse side hereof:

Subject to current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the title against all persons whomsoever.

Dated this 30 day of December, 1969

Francis M. Cooke

STATE OF Arizona
County of Maricopa } ss.

This instrument was acknowledged before me this 30 day of December, 1969, by

Notary Public

My commission will expire

STATE OF
County of } ss.

This instrument was acknowledged before me this day of , 19 , by

Notary Public

My commission will expire

Exhibit D-one

FURNISHED THROUGH THE COURTESY OF TRANSAMERICA TITLE INSURANCE COMPANY

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BEST COPY AVAILABLE

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Easements, claims of easement or encumbrances which are not shown by the public records.

3. Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. The liabilities and obligations imposed upon said land by reason of: (a) inclusion thereof within the boundaries of the Salt River Project Agricultural Improvement and Power District; (b) membership of the owner thereof in the Salt River Valley Water Users' Association, an Arizona corporation; (c) the terms of any Water Right Application made under the reclamation laws of the United States for the purpose of obtaining water rights for said land; and (d) subscription for capital stock of the Salt River Valley Water Users' Association, an account of land in Agricultural Improvement District No. 2 and Drainage District No. 2.

5. Mortgage executed by buyers M. Seth Horne and Maurine D. Horne to Francis M. Cocke to secure an indebtedness of $_____, and other amounts payable thereunder, dated_____, recorded_____in Docket_____, page_____.

BEST COPY AVAILABLE

County of [illegible] In DOCKET and indexed in deeds

Fee No.

at the request of

When recorded, mail to:

Witness my hand and official seal.

, County Recorder,

By Deputy Recorder

Compared
Photostated
Fees

WARRANTY DEED

Parcel 2

For the consideration of Ten Dollars, and other valuable considerations,

hereafter called the Grantor, whether one or more than one, hereby conveys to

the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit

(PARCEL NO.2), That part of the Southeast quarter (SE¼) of Section Twenty (20), Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Beginning at a point on the North line of said SE¼ of Section 20 which bears S.89°43'55"W. 528.00 feet from the Northeast corner of said SE¼ of Section 20; thence S.0°20'41"E. 435.44 feet to the middle of the George Ditch; thence S.76°59'43"W. 236.29 feet along the middle of the George Ditch; thence S.67°40'43"W. 211.50 feet along the middle of the George Ditch; thence S.69°31'41"W. 399.54 feet along the middle of the George Ditch to a point on the West line of the E½ SE¼ of said Section 20; thence S.0°07'25"E. 1381.50 feet along the West line of the E½ SE¼ of said Section 20 to a point on the North bank of the Jenkins Ditch; thence N.88°40'37"W. 463.68 feet along the North bank of the Jenkins Ditch; thence N.89°08'43"W. 481.97 feet along the North bank of the Jenkins Ditch; thence N.0°51'17"E. 9.00 feet; thence N.56°56'50"W. 328.73 feet; thence N.34°59'16"W. 150.00 feet; thence S.89°54'35"W. 25.00 feet to a point on the West line of said SE¼ of Section 20; thence N.0°05'25"E. 1757.73 feet along the West line of said SE¼ of Section 20 to the Northwest corner of said SE¼ of Section 20; thence N.89°43'55"E. 2121.23 feet along the North line of said SE¼ of Section 20 to point of beginning, containing 72.3284 acres within the limits of the City of Tempe and subject to existing rights of way and easements for roads, ditches, and public utilities; and subject to the encumbrances shown on the reverse side hereof:

Subject to current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the title against all persons whomsoever.

Dated this 30 day of December 1968

Francis M. Locke

STATE OF Arizona
County of Maricopa

This instrument was acknowledged before me this 30 day of December, 1968 by

Mrs Cecil J. Bastow

My Commission Expires 12/12/69 Notary Public

My commission will expire

STATE OF [illegible]
County of [illegible]

This instrument was acknowledged before me this [illegible] day of [illegible], 19[illegible], by

[illegible]

Notary Public

My commission will expire

Exhibit D-One

FURNISHED THROUGH THE COURTESY OF TRANSAMERICA TITLE INSURANCE COMPANY

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1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Easements, claims of easement or encumbrances which are not shown by the public records.

3. Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. The liabilities and obligations imposed upon said land by reason of: (a) inclusion thereof within the boundaries of the Salt River Project Agricultural Improvement and Power District; (b) membership of the owner thereof in the Salt River Valley Water Users' Association, an Arizona corporation; (c) the terms of any Water Right Application made under the reclamation laws of the United States for the purpose of obtaining water rights for said land; and (d) subscription for capital stock of the Salt River Valley Water Users' Association, on account of land in Agricultural Improvement District No. 2 and Drainage District No.2.

5. Controlled right of access to Interstate Highway referred to in Civil No. 183278; Lis Pendens recorded in Docket 5874, page 566.

6. Mortgage executed by Francis M. Cocke to The Federal Land Bank of Berkeley to secure an indebtedness of $_____, and other amounts payable thereunder, recorded April 14, 1966 in Docket 6004, page 97, which Francis M. Cocke has agreed to pay.

7. Mortgage executed by buyers M. Seth Horne and Maurine D. Horne to Francis M. Cocke to secure an indebtedness of $_____, and other amounts payable thereunder, dated_____, recorded_____in Docket_____, page_____.

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When recorded, mail to:

[illegible]

For use by County Recorder

PARTIAL RELEASE OF MORTGAGE

For a valuable consideration FRANCIS M. COCKE, a divorced man

does hereby release from the lien of that certain mortgage executed

by M. S. HORNE

to FRANCIS M. COCKE

recorded in Docket , page , records of County, Arizona, the following described property:

Copy - Not for Record

That certain parcel of land referred to as Parcel 2A, beginning at the center of Section 20, Township 1 North, Range 4 East;

Thence South 0° 05' 25" West 425.963 feet;
Thence North 89° 43' 55" East 512.109 feet;
Thence North 0° 07' 25" West 425.963 feet;
Thence South 89° 43' 55" West 510.515 feet to the true point of beginning; containing 5.0 acres, more or less.

This release does not affect in any way the balance of the property described in said mortgage, but releases only the above described property.

Dated this day of , 19

Francis M. Cocke
Francis M. Cocke

STATE OF ARIZONA)
) ss.
County of Maricopa)

This instrument was acknowledged before me this 5 day of March 1969 by Francis M. Cocke.

Henry Kuranaga
Notary Public

My commission will expire: 4/13/69

Form 12 Rev. 5/59

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When recorded, mail to:

FRANCIS HARVIS & GIVENS
ATTORNEYS AT LAW
[illegible] W. G. BUILDING
[illegible] AVENUE
[illegible]

For use by County Recorder

PARTIAL RELEASE OF MORTGAGE

For a valuable consideration FRANCIS M. COCKE, a divorced man

does hereby release from the lien of that certain mortgage executed

by M. S. HORNE

to FRANCIS M. COCKE

recorded in Docket , page , records of County, Arizona, the following described property:

That certain pracel of land referred to as Parcel 2Q, beginning at the center of Section [illegible], Township 1 North, Range 4 East; thence North 89° 43' 55" East 928.565 feet; thence South 0° 07' 25" East 520.99 feet; thence North 89° 43' 55" East 22 feet; thence South 0° 07' 25" East 1041.98 feet to the true point of beginning:

Thence South 0° 07' 25" East 518.37 feet;
Thence South 88° 40' 37" East 418.20 feet;
Thence North 0° 07' 25" West 529.98 feet;
Thence South 89° 43' 55" West 418.05 feet
to the true point of beginning; containing
4.96 acres, more or less.

Copy Not for

This release does not effect in any way the balance of the property described in said mortgage, but releases only the above described property.

Dated this day of , 19

Francis M. Cocke
Francis M. Cocke.

STATE OF ARIZONA)
) ss.
County of Maricopa)

This instrument was acknowledged before me this 5 day of March 1969 by Francis M. Cocke.

Henry Kennedy
Notary Public

My commission will expire: 4/13/69

Form [illegible]-2 Rev. 5/59

277

BEST COPY AVAILABLE

...d, mail to:

...VENS
...
...
...
...

For use by County Recorder

PARTIAL RELEASE OF MORTGAGE

For ... ...ble consideration FRANCIS M. COCKE, a divorced man, as to
an ... ...ded one-half interest

... release from the lien of that certain mortgage executed

... HORNE

... ...S M. COCKE

... ...Docket ..., page ..., records of ... County, Arizona
...ng described property:

That certain parcel of land referred to as Parcel
..., beginning at the Southeast corner of Section
20, Township 1 North, Range 4 East, thence North
0° 20' 17" West 516.96 feet to the true point of
beginning:

Thence North 0° 20' 17" West 490.255 feet;
Thence North 88° 40' 37" West 444.326 feet;
Thence South 0° 20' 17" East 490.255 feet;
Thence South 88° 40' 37" East 444.326 feet
to the true point of beginning; containing
5.0 acres, more or less.

Copy — Not for use

This release does not affect in any way the balance of the property described in said mort... but releases only the above described property.

Dated this ... day of ..., 19

Francis M. Cocke
Francis M. Cocke

...TE OF ARIZONA)
) ss.
...nty of Maricopa)

This instrument was acknowledged before me this 5 day of March 1969
... Francis M. Cocke

Henry Farnsworth
Notary Public

...sion will expire: 4/13/69

...-72 Rev. 5/59

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim of F. M. Cocke.	No. C-222472 F. M. COCKE'S MOTION TO VACATE ORDER STRIKING HIS AMENDED COUNTER-CLAIM AGAINST PLAINTIFFS

Filed: September 9, 1971.

* * * * *

* * *Since that [the Arizona] constitution adopts the Federal Constitution as the supreme law of the land, it is of course clear that this court is completely without the power, or jurisdiction, to

deprive a person of the rights or immunities granted by the Federal Constitution. One of these is the right to enforce contract obligations, without impairment by the judicial department.

* * * * *

It cannot be denied that the rights to enforcement of contract obligations is a property right, nor that under the 14th Amendment property rights are civil rights protected by the United States civil and criminal code against invasion by person acting under color of state law. Monroe v. Pape, 306 U.S. 167, 81 S.Ct. 473, 5 L.ed.2d 492.

* * * * *